

No. 36201-5-II

COURT OF APPEALS, DIVISION TWO
OF THE STATE OF WASHINGTON

CITY OF GIG HARBOR, a Washington municipal corporation,

Respondent,

v.

RAINIER YACHT HARBOR, LLC, et al

Appellant,

REPLY BRIEF OF APPELLANT RAINIER YACHT HARBOR, LLC

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I. SUMMARY OF REPLY

Respondents City of Gig Harbor and Frisbie go to great lengths to present their own judgment as to what garage size or capacity or driveway size should be considered “normal” under the Shoreline Management Act (SMA) provision that exempts single-family residences (and their normal appurtenances) from the requirement to obtain a shoreline substantial development permit. RCW 90.58.030(3)(e)(vi). The City focuses on its own efforts – all which were taken after Rainier Yacht Harbor LLC (Rainier Yacht) submitted its land use applications – to poll administrators in other jurisdictions and survey other residential development to define “normal.” The City argues that the Examiner had no choice but to accept its staff’s never before articulated view of “normal”.

The City’s arguments regarding what constitutes “normal”, however, are irrelevant since they fail to acknowledge two inescapable realities about the applicable law. First, Washington State’s Department of Ecology (DOE) has already determined that all garages and driveways associated with single family residences – regardless of size or capacity – are deemed “normal appurtenances” to single family residences; as such they are exempt from the shoreline substantial development permit requirement. WAC 173-27-040(2)(g) expressly provides: “On a statewide basis, normal appurtenances include a garage; deck;

driveway...” The plain language of the regulation does not qualify the Ecology’s determination with size, capacity or any other limitations.

The second inescapable reality concerning the law on this issue is that local jurisdictions such as Gig Harbor may only limit or define “normal appurtenances” legislatively. The City is not authorized to define “normal” on an ad hoc basis by polling other jurisdictions after an application has been submitted. WAC 173-27-040(2)(g) provides: “Local circumstances may dictate additional interpretations of normal appurtenances which shall be set forth and regulated within the applicable master program.” (Underlining added.) The City does not deny that it has not adopted any shoreline master program policies or regulations to provide additional interpretations of this DOE regulation. (CP 174, Finding 41.) Thus, the DOE regulation – which proclaims that all garages and driveways are deemed normal appurtenances – provides the exclusive guidance on the issue of normal appurtenances in this case.

To the extent that the SMA and the associated regulations leave room for interpretation the question of whether the specific applications here qualify for the exemption for single family residences with normal appurtenances, then the determination is a factual determination. Whether a particular proposed development falls within the family residence exemption of the SMA is a question of fact. *Kates v. Seattle*, 44 Wn. App.

754, 760, 723 P.2d 493 (1986). Under the Gig Harbor Municipal Code (“GHMC”), this factual determination is to be made by the Gig Harbor Hearing Examiner, the City’s highest fact-finding decision-maker on shoreline permitting issues. GHMC § 17.10.080; §19.01.003.

Following an open hearing, the Gig Harbor Hearing Examiner determined that the two single-family residences proposed by Rainier Yacht, including their combined basement/garages and the driveway providing access, are exempt under the SMA. The Examiner determined that the structures are what they are represented to be and, as represented, will be used as single family residences by the owners of Rainier Yacht. As noted earlier, the Examiner stood on solid statutory ground when he rendered this decision. His findings were likewise well-supported by the substantial evidence in the record.

The City and Frisbie’s primary challenge to the Examiner’s factual determination that Rainer Yacht’s applications are for single family residences and normal appurtenances thereto, is their claim that the Examiner should not have believed Rainier Yacht’s stated intentions for these homes. The City challenges the Examiner’s factual decision, after considering and weighing the evidence presented, to accept as true Rainier Yacht’s representations that the homes will be used for residential purposes as represented in the applications and the sworn testimony at the

hearing. (*See* CP 394-404, 441, 482-506; *see also*, CP 76.) The City believes that the Examiner should have distrusted and refused to believe that the homes and garages will be used as stated in Rainier Yacht's applications and supporting materials.

The City speculates, and asks this Court to likewise speculate, that Rainier Yacht has not, in earnest, abandoned its original, but thwarted plans to construct a mixed-use structure and commercial marina. The City asks this Court to conjecture that, some time in the future, Rainier Yacht's owners will take actions so contrary to their application representations that predicted conduct will render their applications a fraud.

The Examiner was well within his authority, after weighing the evidence, to accept Rainier Yacht's representations as true and decline the City's invitation to speculate as to property owners' future intentions. Having failed to persuade the Examiner, the City now asks this Court, acting in its appellate capacity, to independently evaluate the credibility of the evidence and Rainier Yacht's representations. Such independent weighing of the evidence is not, however, permitted under the Land Use Petition Act ("LUPA"). RCW 36.703.130(1)(c). This Court is without legal authority to substitute its judgment for that of the Examiner's with regard to this factual determination.

In reality, the City is angry that Rainier Yacht successfully vested

residential development applications before the City completed its legislative efforts to further limit the size of residential structures in the area as it had previously limited the size of commercial development. The City elected to exclusively restrict its moratorium to commercial development while it proceeded to revise its ordinances governing building size limitations. This affirmative decision allowed all land owners, including Rainier Yacht, to proceed with residential development under the old regulatory framework that did not so strictly limit the size of residential structures. Rainier Yacht responded to the ever-changing legal landscape in Gig Harbor and revised its project to conform to the laws in place at the time the application was submitted. In so doing, Rainier Yacht was not acting inappropriately, illegally or fraudulently, but was acting well within its rights as a property owner.

This appeal of its own Hearing Examiner's decision is little more than an attempt by the City to regulate land use and development retroactively. The Hearing Examiner's decision was consistent with the applicable law and supported by the substantial evidence in the record. The trial court should be reversed and the Examiner's decision reinstated.

II. REPLY ARGUMENT

A. The City Misstates The Standard Of Review To Be Applied On This Land Use Petition Act Appeal.

Although Rainier Yacht is the appellant in this pending appeal, the City, as the party seeking to overturn the decision of its own Hearing Examiner, bears the burden to establish that the Examiner's decision was made in error. On a LUPA appeal, "the superior court is required to serve in an appellate capacity to an administrative action." *Wellington River Hollow, LLC v. King County*, 113 Wn. App. 574, 580, n. 3, 54 P.3d, 213, *as amended by* 121 Wn. App. 224 (2002). If the superior court's decision on a LUPA appeal is further appealed, as is the case here, the court of appeals stands in the same shoes as the superior court and will review directly the decision of the hearing examiner based only upon the administrative record that was before the hearing examiner. *Id.* at 580.¹

A court's review under LUPA of a land use decision is deferential. *Schofield v. Spokane County*, 96 Wn. App. 581, 586, 980 P.2d 277 (1999). This is especially true with regard to the Examiner's factual findings, since the court must "view the evidence and any reasonable inferences in the light most favorable to the party that prevailed in the highest forum exercising fact-finding authority." *Id.* at 586-87. Before this Court is the

¹ Thus, if a superior court issues findings of fact and conclusions of law, those findings and conclusions by the trial court will be deemed surplusage and will be ignored by the court of appeals in a subsequent appeal. *Id.* at 580, n.3. See also, *Satsop Valley Homeowners Ass'n, Inc. v. Northwest Rock, Inc.*, 126 Wn. App. 108, 541, P.3d 1247 (2005); *Van Sant v. Everett*, 69 Wn. App. 641, 647, 650-51, 849 P.2d 1276 (1993).

Examiner's factual determination that the developments proposed here are for single family residences and normal appurtenances thereto that will be occupied by owners of Rainier Yacht and, thus, are exempt from the SMA requirement to obtain a shoreline substantial development permit. Again, whether a particular development falls within the single family residence exemption of the SMA is a question of fact. *Kates v. City of Seattle*, 44 Wn. App. 754, 760, 723 P.2d 493 (1986).

Recognizing that it carries the burden on this appeal and that deference must be accorded to the Examiner's factual findings, the City attempts to eliminate the Legislature's directive to give deference to the Examiner's findings by unilaterally re-characterizing the nature of the issues on review. First, the City asserts that there is a different standard of review to be applied to the Examiner's factual determinations than the "substantial evidence" test expressly articulated in LUPA because this is a shoreline case. RCW 36.70A.130(1)(c). The City states:

Standard (c) concerns a factual determination that the court reviews for substantial evidence. "Substantial evidence is evidence that would persuade a fair-minded person of the truth if the statement asserted." ... Rainier Yacht argues that this Court must provide deferential review of the Hearing Examiner's decision. However, here is a different standard of review applicable to shoreline cases, allowing the court to substitute its judgment for that of the Examiner "where necessary to ensure that a proposed project complies with the Shoreline

Management Act. *Batchelder v. Seattle*, 77 Wn. App. 154, 161, 890 P.2d 25 (1995).”

(City’s Brief at p. 27.) The City misrepresents the *Batchelder* decision.

To begin, *Batchelder* involved review of a Shoreline Hearings Board decision made pursuant to the SMA and the APA. *Batchelder* did not involve a LUPA appeal of an exemption decision as presented here, and the court was not subject to the express standards of review set forth in RCW 36.70C.130. Washington’s Supreme Court has expressly held that a local government decision that a development project is exempt and “does not fall within the jurisdiction of the SMA” is not reviewable by the Shoreline Hearings Board. *Samuel’s Furniture, Inc. v. Ecology*, 147 Wn.2d 440, 449, 54 P.3d 1194 (2002). Such a decision may only be appealed to a superior court pursuant to LUPA and reviewed under the specific standards of review set forth in LUPA. *Id.* at 449-51. Thus, the standards of review articulated in *Batchelder* have no application here.

More importantly, the City’s assertion that *Batchelder* authorizes a court to substitute its own judgment for that of the agency’s when it reviews the agency’s factual findings is false. Contrary to the City’s assertion, the *Batchelder* court admonished that factual findings may not easily be disturbed:

Judicial Review of a decision of the SHB is governed by the Administrative Procedure Act, RCW 34.05. ...On factual matters, the administrative agency can be overturned if the decision is “arbitrary and capricious”, or when:

The order is not supported by evidence that is substantial when viewed in light of the whole record before the court. ...

Evidence is substantial if it would convince an unprejudiced, thinking mind of the truth of the declared premise.

Id. at 158 (citations omitted). The *Batchelder* court also noted that, “[w]hile the burden of proof respecting the issuance of permits before local government is with the applicant, on appeal to the SHB, ‘the person requesting the review has the burden of proof.’” *Id.* at p. 159 (citations omitted.) Thus, the *Batchelder* court did not lower the standard of review of any agency’s factual determinations.

The *Batchelder* did acknowledge that a court may, after considering the deference due an agency, substitute its judgment for that of the Shoreline Hearings Board with regard to the Board’s legal interpretations. The quotation cited by the City in its brief, when placed into context, is as follows:

Batchedler disputes Ainlie’s claim that the SHB correctly interpreted the terms of the Shoreline Master Program regarding shoreline setbacks. Interpretation of the Shoreline Master Program is a question of law. Although substantial weight is accorded to the agency’s legal interpretation if it falls within the agency’s expertise in a special area of the law, the reviewing court may, where necessary to ensure that a proposed project complies with the SMA, substitute its judgment that of the agency. (Underlining added.)

Batchelder, 77 Wn. App. at 161. The *Batchelder* decisions authorize courts to substitute their judgment for that of an agency when reviewing an agency's factual determinations. Rather, *Batchelder* does little more than state the well-known rule that courts are the ultimate interpreters of the law and, while they may defer to statutory interpretations by agencies with special expertise, courts are not required to so defer.

Next, again hoping to avoid LUPA's substantial evidence test for factual findings and obtain a *de novo* review, the City attempts to apply the "procedural error" standard in RCW 36.70C.130(1)(a) by characterizing the Examiner's factual determinations as determinations made while engaging in "unlawful procedure." (City's brief at p. 28.) The asserted "unlawful procedure" is that the Examiner allegedly failed to make sufficient findings to support his conclusions. Notably, the City did not assert error under the "unlawful procedure" standard of review in either its Petition for Review or in its briefing to the trial court. (See CP 10-15, 1229-55, 1296-1309.) Rather, the City only asserted that the Examiner's decision was not supported by the substantial evidence in the record (RCW 36.70C.130(1)(d)) and that the Examiner made an erroneous interpretation of the law (RCW 36.70C.130(1)(b)). (CP 10-15, 1241-42.)

There is no legitimate claim that the Examiner engaged in any unlawful procedure or that the Examiner failed to follow a prescribed

process and *de novo* review of the Examiner's factual findings is neither authorized nor appropriate. The City simply complains that the Examiner's findings are not supported by the substantial evidence in the record or did not sufficiently show the Examiner's iterative process. The Examiner's findings should be reviewed, applying the mandatory deferential standard of review, to determine if the findings are supported by the evidence in the record and, in turn, support the Examiner's conclusions.² The appropriate standard is the substantial evidence test and the City is not entitled to receive the benefit of a *de novo* review.

B. The Examiner Properly Concluded That Rainier Yacht's Proposed Developments Qualify For The Single-Family Residence Exemption.

1. The SMA does not prohibit application of the single-family residence exemption to property owned by an LLC. The City's newly raised argument must be rejected.

The City argues, for the first time, that the Examiner engaged in an

² The City spends substantial time in its brief criticizing the Examiner's findings, relying upon isolated quotes to support its arguments. Despite that the City's focus is a criticism of the Examiner's findings, the City does not include a copy of the Examiner's decision with the many other documents appended to its brief. Because the Examiner's decision is at the center of this appeal, a copy of the Examiner's complete decision is attached as Appendix A. To provide a complete picture of the positions taken by the City throughout the administrative process, the City's Administrative Decisions and the Community Development Staff Report are also appended as Appendix B, Appendix C and Appendix D, respectively.

Contrary to the City's assertions in its Brief, the Examiner made several findings to address the issues actually raised in the administrative proceeding. Rainier Yacht spends substantial effort in its opening brief to call to this Court's attention the multiple findings that show the Examiner's iterative process and support the Examiner's ultimate conclusions. (*See* Rainier Yacht's Opening Brief at pages 19-24.) Rainier Yacht will not repeat this description in this Reply brief.

“unlawful procedure” because the Examiner “failed” to address whether a corporation may obtain an exemption under RCW 90.58.030(3)(e)(vi). The City claims that there are no findings or analysis in the Examiner’s decision on this issue.

The City is incorrect in its statement that there are no findings on this issue. The Examiner specifically found that the proposed homes will be used as the personal residences of Mike Burton and his family and Bruce Steel and his family, both members and owners of Rainier Yacht Harbor, LLC. (CP 174, Findings 42 and 43.) It is true that the Examiner does not spend substantial time on this issue. The Examiner’s brevity, however, is merely a function of the fact that the issue of whether a corporation may receive the benefit of the single-family residence exemption was not raised in the City’s Administrative decision and, correspondingly, was not raised by Rainier Yacht in its appeal of the Administrative Decision. (*See* CP 910-11, 962-65.)

The question of ownership and use of the property was raised by the City staff during the permit application review process. Rainier Yacht fully responded to the City’s only inquiry on this issue. Bruce Steel, the managing member and an owner of Rainier Yacht wrote to the City:

This letter is in response to your voice mail left with our attorney, Bill Lynn, regarding the ownership of the proposed homes on Harborview Drive. The property is currently owned by Rainier Yacht

Harbor, LLC. There are two Members of the LLC, myself, and Mike Burton....

It is our intent to dissolve the LLC at a future date, and each of us will take title to our respective lots and personal residences. If you have any questions, please give me a call. (CP 441.)³

Mr. Steel's response obviously satisfied the City's concerns with regard to the ownership of the legal entity holding title to the properties and the personal use of the homes for the owners' residences. The Gig Harbor's Community Development Director's Administrative Decision (denying the exemption) included the following "Findings of Fact":

1. The residence located at 3525 Harborview Drive will be constructed for the use of Mike Burton and his family, for use as a single family residence and garage appurtenant to a single family residence, as allowed under WAC 173-27-040(g). This residence is 4,258 square feet, with a basement garage of 3,650 square feet.
2. The residence located at 3555 Harborview Drive will be constructed for the use of Bruce Steel and his family, for use as a single family residence and garage appurtenant to a single family residence, as allowed under WAC 173-27-040(g). This residence is 4,917 square feet, with a basement garage of 5,150 square feet.

(CP 962) Though the Development Director denied the requested exemptions on the asserted bases that the proposed garages are too large to

³ Rainier Yacht's Limited Liability Company Agreement confirms that the LLC is owned by the Steel and Burton families. Specifically, Rainier Yacht is owned by Bruce and Gloria Steel, Jonathon Todd and Tamara Steel, Gerald N. and Barbara Burton and Gerald M. (Mike) and Lynda Burton. (CP349-50.) Purpose of LLC is to own and develop the property that is the subject of this litigation. (*Id.*)

be “normal” and the driveway would be shared by an existing commercial use, the Director expressed no concern regarding the corporate ownership in the Administrative Decision. (*See* CP 962-65.)

That the exemption could be applied to property owned by a limited liability company was not a contested issue before the Hearing Examiner.⁴ On an appeal of a land use decision, a party may not raise in subsequent appeals an issue that was not raised before. *Boehm v. City of Vancouver*, 111 Wn. App. 711, 722, 47 P.3d 137 (2002) (“in order for an issue to be properly raised, there must be more than simply a hint or a slight reference to the issue in the record.”) The City did not timely raise the issue of corporate ownership of exempted property and this Court should not entertain the issue.

Even if the City timely raised the issue, the argument is without merit. RCW 90.58.030(e)(vi) provides that the following development is exempt from the requirement to obtain a shoreline substantial development permit:

Construction on shorelands by an owner, lessee, or contract purchaser of a single family residence for his own use or for the use of his or her family, which use does not exceed a height of thirty-five feet above average grade... (Underlining added.)

Nothing in this SMA provision precludes application of this exemption to

⁴ The issue was likewise never raised by the City in its LUPA petition or in the City’s briefing to the trial court. (*See*, CP 1-51, 1229-1255, 1296-1309.)

projects in which title to the subject property is held by an LLC or any other corporate entity. The only requirement is that construction be by an owner and that the structure will be used by the owner's family. That requirement was met. Rainier Yacht owns the property. (CP 322-27.) Mike Burton and Bruce Steel are owners of Rainier Yacht. (CP349-50, 441.) Mike Burton and his family and Bruce Steel and his family will live in the homes. (CP 441.) The Examiner's (and the Community Development Director's) findings are supported by this evidence.

The City cites *Department of Ecology v. Pacesetter Construction Co., Inc.*, 89 Wn.2d 203, 571, P.2d 196 (1977) to support its claim that, as a matter of law, a single-family residence exemption can never be issued when the property being developed is owned by a corporation. The *Pacesetter* decision contains no such holding.

In *Pacesetter*, the court was asked to determine if the SMA, "as applied to a privately owned lakefront lot violates article 1, section 16 (amendment 9) of the state constitution which forbids the taking or damaging of private property without just compensation." *Id.* at 205. In concluding that there was no taking, the court of appeals referenced several findings, made by a trial court following a trial. *Id.* at 207. Based upon the very specific evidence presented in the trial, including that the applicant prepared an earnest money agreement purporting to sell the property to a third party (Tingwall) for development with a single family

residence without that third party's permission and forged the third party's signature, the trial court found: "[T]he Tingwall earnest money agreement was a sham to mislead the City into continuing, in effect, a building permit on the upper portion of the Pacesetter property." *Id.* at 206.

The *Pacesetter* court never addressed the issue of whether property owned by a corporation could be eligible for a single-family residence shoreline exemption and its decision certainly does not stand for the proposition that a corporation cannot qualify for the exemption. Instead, the *Pacesetter* court addressed (after the benefit of a trial) very egregious conduct that is not present here. No language in the SMA that precludes application of a single-family residence exemption to development of property owned by a limited liability company when the home is being constructed for residential use and occupancy of the company's owners.

2. The Examiner properly refused to engage in the impermissible speculation on future actions by Rainier Yacht advocated by the City and Frisbie.

The Hearing Examiner made the factual finding that

Rainier Yacht's applications, by their terms and according to the testimony of its architect, Mr. Bull, are designed for single-family residences.

(CP 177, Finding 59.) His finding was supported by the applications that were received as evidence in the record and the sworn testimony presented

at the hearing. (*See* CP 394-404, 441, 482-506;⁵ *see also*, CP 76.)

The City and Frisbie ask the Court to assume that the members of Rainier Yacht were lying when they represented to the City staff and to the Examiner that the families that own Rainier Yacht will occupy the homes as their residences and will use the basement garage for personal residential purposes after the homes are constructed. The City criticizes the Examiner for his refusal to engage in an elaborate analysis of or simply accept as true the City and Frisbie's dire predictions for the future. Effectively, the City and Frisbie argue that the Examiner should have found that Rainier Yacht has already committed fraud based upon unilateral speculation of future conduct. The City and Frisbie now demand this Court not only to join in their conjecture, but assume that the Steel and Burton families will convert the single family homes in to commercial structures and, ultimately, perpetuate a fraud on the City. The City fails, however, to cite any authority that an exemption, or any other land use application, may be denied based upon speculation that the applicant will subsequently act inconsistently with the representations on his application or will convert a structure to another use in the future.

⁵ Note that the applications were signed by Bruce Steel, the managing member of Rainier Yacht, certifying the contents of the applications to be true. (*See* CP 304-04, 484-506.)

To the contrary, it is improper to deny a permit application based upon speculation that the applicant will not, in the future, comply with the terms of the permit. *Maranatha Mining, Inc. v. Pierce County*, 59 Wn. App. 795, 805, 801 P.2d 985 (1990). It is likewise not appropriate to deny a land use application based on the fact that other uses or expansions could occur in the future. *San Juan County v. Dept. of Natural Resources*, 28 Wn. App. 796, 802, 626 P.2d 995 (1981). The Hearing Examiner was within his authority when he assumed that the members of Rainier Yacht will follow the law. *See Hutchins v. 1001 Fourth Ave. Assocs.*, 116 Wn.2d 217, 236, 802 P.2d 1360 (1991)(“one is normally allowed to proceed on the basis that others will obey the law.”); *see also, Tardif v. Hellerstedt*, 37 Wn.2d 940, 943, 226 P.2d 908 (1951). The Examiner’s approach was especially appropriate, since it was consistent with the well-established rule that fraud will never be presumed, but must be proven by evidence that is clear, cogent, and convincing. *Markov v. ABC Transfer & Storage Co.*, 76 Wn.2d 388, 395 457 P.2d 535 (1969); *Beckendorf v. Beckendorf*, 76 Wn.2d 457, 462, 457 P.2d 603 (1969).

There is certainly no evidence in the record that would compel or mandate the Examiner to reach the singular conclusion that Rainier Yacht has misrepresented their application or will engage in suspect conduct in the future. The Examiner likewise did not simply ignore the

misrepresentation claims asserted by Frisbie at the public hearing.⁶ The Examiner specifically found that “[m]ost of the evidence cited by Mr. Frisbie and Mr. Allen, however, relates to actions taken by Rainier Yacht prior to the adoption of Ordinance 1003, and Rainier Yacht’s subsequent change of its development proposal from mixed-use commercial to single-family residential.” (CP 173, Finding 37.)

The City relies upon a single submittal – a JARPA application – that was made to a State agency after Rainier Yacht converted its project to residential development to support the bold allegation that Rainier Yachts applications have been fraudulently submitted to support illegal actions in the future. (*See* CP 516-39.) The JARPA application was submitted on July 22, 2005, shortly after the residential applications were submitted. (*See* CP 484-506.) Notably, the JARPA application specifically identified the upland development permits as building permits for residential structures. (CP 521.) The application did not identify any permit applications for commercial structures. In any event, Rainier Yacht Harbor later terminated its application with the Corps of Engineers, thus

⁶ This Court should not forget that the City staff did not join in Frisbie’s view that the applications should be treated as commercial applications based upon conjecture of future conduct. The Community Development Director made no claims that the applications were misrepresented in his Administrative Decision. (CP 962-65.) Likewise, the staff, after receiving all of Frisbie’s evidence, including the JARPA application, rejected Frisbie’s argument that the application should be treated as a commercial application. (CP 616, 618.) It was only in the subsequent court proceedings that the City embraced the “future fraud” argument previously advanced by Frisbie.

making clear that its present plans are for single-family homes and eliminating any need to provide a copy of the JARPA application to the City. (CP 516-39.)⁷ The Examiner, applying his discretion as a fact-finder, found that the withdrawn application was insufficient to establish that Rainier Yacht's applications were for commercial development disguised as residential development. (CP 173, Finding 37.) The Examiner found:

...despite what Rainier Yacht may, or may not, intend for the future, Rainier Yacht's single-family residential proposals have been submitted and processed consistent with the city code applicable at the time of submittal.

(*Id.*) The mere existence of this withdrawn application is certainly not sufficient to disturb his finding on this appeal.⁸

Finally, even if Rainier Yacht wished to pursue a marina in the future, Rainier Yacht cannot do so without first obtaining a substantial

⁷ Rainier Yacht Harbor LLC has maintained its application with the Department of Natural Resources for a harbor lease and has submitted documentation needed by the DNR to process that application. Such a lease would be needed for **any** use of the associated tidelands. The owners of these homes will have a clear interest in leasing the land for moorage and for view preservation purposes. This interest is totally independent of any marina. The Examiner acknowledged this fact in his findings. (CP 713, Finding 37.) In any event, in this climate when even its single-family home proposals are being challenged, the Rainier Yacht certainly cannot be faulted, for preserving as many of its options as possible. The City cannot challenge every single land use action associated with the property and somehow fault the owners for trying to do what they can to preserve the value of their investment.

⁸ There is also no law that would support a conclusion that Rainier Yacht was without the right to keep its options open. The permit review process in this case has demonstrated that the project exists in an extremely uncertain environment. If this project is ultimately denied, or even if approved, Rainier yacht could, consistent with the code, explore a marina without the upland structures or with different upland structures. There is no legitimate basis, however, for this Court to simply choose to reject Rainier Yacht's application based upon the City's speculation.

development permit. The Gig Harbor staff planner testified to the Examiner that a marina could not be pursued without receipt of a shoreline substantial development permit. (CP 113. *See also* RCW 90.58.140(2), 90.58.030(d) and (e).) Further protecting the City, the Examiner made receipt of a shoreline substantial development permit an express condition to converting the structure from residential use (private garage) to commercial use (e.g. public garage for a marina). The City asserts, without authority, that the condition is unenforceable. The condition was not appealed, however, and is binding on Rainier Yacht. Moreover, the law does not permit a decision-maker to assume that the local jurisdiction will not enforce conditions to permit approvals. *Maranatha Mining, supra*, 59 Wn. App. at 805. Conjecture of a future use conversion of is not a legitimate basis to deny the requested SMA exemption.

3. The Examiner properly refused to apply vague subjective standards in determining that the proposed residential development includes “normal” appurtenances.

The City challenges the basement/garages that will be part of the residences and the single driveway that will provide access for both residences as something other than “normal” appurtenances. The City subjectively argues that, because of their proposed size, the basement/garages and driveway cannot be “necessarily connected to the use and enjoyment of a single family residence.” (WAC 173-27-040-

(2)(g).) Of course, the City completely ignores the fact that the subject basements (which incorporate the garages) are part of the exempted residences and, since they are not separate structures, need not meet the “normal appurtenances” definition to be exempt. They are part of the residential structures and therefore exempt. Regardless, the City’s subjective argument as to what appurtenances to a single-family will qualify as normal is inconsistent with the plain language of the applicable regulation, which provides: “On a statewide basis, normal appurtenances include a garage... driveway...” (WAC 173-27-040-(2)(g).)⁹ Garages and driveways are categorically exempt. The State regulations do not qualify the exemption based upon the size of the garage or the number of cars the garage might potentially accommodate.

The City claims that DOE concluded that, given the size of the basement/garages, they cannot qualify for the single family home exemption. This is not true. DOE stated: “If the property owners are now limiting their development to two single-family residential structures for residential uses only, and limiting site impacts to those necessary for constructing the homes, then a shoreline exemption may be appropriate.

⁹ The City’s position is also inconsistent with the fact that there are other single-family homes in Pierce County, as well as other counties, that have similarly large basements and garages. (CP 549-602.) The Examiner was free to accept this evidence over the evidence presented by Frisbie when he made his factual determinations. Of course, in light of DOE’s determination that all garages are deemed normal appurtenances to single family residences, there was no need to assess or define “normal”.

(CP 507.) DOE did qualify its conclusion by stating: “Absent assurances that this development is limited to residential uses, I can not [sic] agree that the proposals meet the criteria for an exemption.” (*Id.*) Those assurances, however, were provided. The assurances were provided by applications that were signed by Bruce Steel, the managing member of Rainier Yacht, certifying the contents of the applications to be true. (*See* CP 304-04, 484-506.) The assurances were further provided by the Examiner’s conditional approval of the exemption. (CP 178.) The Examiner’s decision was consistent with the evidence in the record and the input provided by DOE.

The State regulations likewise do not qualify driveways based upon size or that an already existing commercial use may share use the driveway. After considering the evidence and testimony, the Examiner found that the driveway was specifically designed for access to the two single family residences, the road design was not altered to accommodate the existing commercial float, the driveway will not result in any altered use of the existing commercial float and the driveway will not result in any new commercial uses or structures. (CP 172-73, 177, Findings 33, 35, 36 and 60.) Thus, the driveway is being constructed solely as an appurtenance to the single family homes. The Examiner’s findings are supported by the evidence and consistent with DOE regulations.

Finally, the City's interpretation of the rule, if accepted, would render it unconstitutionally vague, since the City's interpretation would strip the rule of any objective standard. *Anderson v. Issaquah*, 70 Wn. App. 64, 851 P.2d 744 (1993). To the extent that there is any room to limit the size of an appurtenance, the DOE regulations require that it be done by code, with clearly defined standards, and not on an ad hoc basis. WAC 173-27-040(2)(g). The Examiner was correct when he concluded: "Nothing in applicable city code would prohibit the proposed driveway or the size of the basement/garage structures proposed for the two residences." (CP 177, Finding 59.) While the City is obviously dissatisfied with the content of its own regulations, it cannot seek to amend existing regulations through a site-specific permitting process. *See Sleasman v. City of Lacey*, 159 Wn.2d 639, 151 P.3d 990 (2007).

C. If The Examiner Did Fail To Make Required Findings, The Matter Should Be Remanded To The Examiner So That The Necessary Findings May Be Made.

Ignoring the limited authority granted to a Court reviewing a land use decision under LUPA, the City argues that *Batchelder, surpa*, authorized the trial court, and authorizes this Court, to substitute its own judgment for that of the Examiner and make its own findings based upon the record. Of course, as noted earlier, *Batchelder* does not authorize a reviewing court to substitute its own judgment for that of an agency when reviewing factual determinations. Rather, the authorized "substitution of

judgment” is only with regard to an agency’s legal interpretation of applicable laws. 77 Wn. App at 161.

Moreover, the City’s argument is in direct contravention with the limited authority granted to reviewing courts under LUPA. RCW 36.70C.140 only authorizes the reviewing court to affirm or reverse the land use decision or remand it for further proceedings. Rainier Yacht believes that the Examiner made all requisite findings and that all of the Examiner’s findings are supported by the substantial record. If, however, this Court concludes that the Examiner failed to make any necessary findings, then it is the Examiner – the individual charged under the City’s code to weigh and evaluate the evidence – that should review the record and make the required findings.

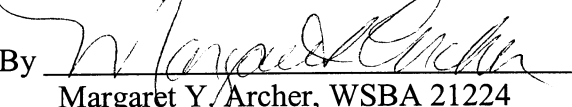
III. CONCLUSION

For the foregoing reasons, this Court should reverse the trial court and reinstate the well-reasoned decision of the Hearing Examiner.

Dated this 26 day of November, 2007.

Respectfully submitted,

GORDON, THOMAS, HONEYWELL,
MALANCA, PETERSON & DAHEIM LLP

By 
Margaret Y. Archer, WSBA 21224
Attorneys for Appellant Rainier Yacht
Harbor

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that on this 26th day of November, 2007, I
did serve by the method indicated below, true and correct copies of the
foregoing by addressing and directing for delivery to the following:

Counsel for Respondent The City of Gig Harbor:

Carol A. Morris

LAW OFFICE OF CAROL A. MORRIS, PC

7223 Seawitch Lane NW

P O Box 948

Seabeck, WA 98380

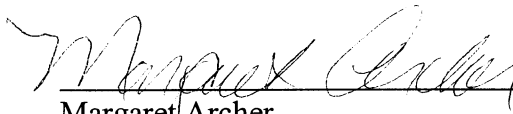
VIA U.S. MAIL

Robert G. Frisbie

9720 Woodsworth Avenue

Gig Harbor, WA 98332-1049

VIA U.S. MAIL



Margaret Archer

APPENDIX A
-HEARING EXAMINER DECISION-
Clerks Papers 155-183

BEFORE THE HEARING EXAMINER
FOR THE CITY OF GIG HARBOR

In Re: the Appeals of Richard B. Allen,
Robert G. Frisbee, and Rainier Yacht
Harbor, LLC,

Appellants.

APPEAL NOS. 05-1097, 05-1143,
05-1144

FINDINGS, CONCLUSIONS AND
DECISION

I. SUMMARY OF DECISION

The City's decisions on design review (DRB 05-832 and 05-834) are affirmed. No portion of the proposed basement/garage structures will exist above-ground in a required yard, as measured from finished grade.

The City's decisions on the shoreline exemption denials (EXP 05-836 and 05-837) are reversed and conditioned.

II. SUMMARY OF PROCEDURE

A. Pre-Hearing Conference and Public Hearing. The Examiner conducted a pre-hearing telephonic conference on January 12, 2006. The City and Rainier Yacht Harbor appeared through their respective counsel, Carol Morris and William Lynn, and Messrs. Frisbie and Allen both participated.

An open record hearing was held in the City of Gig Harbor on January 18, 2006. After receiving no objection from the parties, the Examiner ordered a consolidated record for all three appeals.

B. Exhibits. No proposed exhibits were rejected. The Examiner had the complete City files available for review, and specifically admitted the following exhibits:

Submitted by Robert G. Frisbee and Richard B. Allen:

1. WAC 173-27-040, Developments Exempt From Substantial Development Permit Requirement;
2. WSDOE November 2, 2005 Letter to City noting two terms of WAC 173-27-040(2)(g) that the Burton and Steel proposals do not meet;
3. Rainier Yacht Harbor, LLC June 3, 2005 letter to City requesting interpretation of GHMC 17.72.020(d) which provides for "off street

parking spaces may be located in any required yard....";

4. City's Hearing Brief for APP 05-817;
5. Verbatim Transcript of the August 17, 2005 APP 05-817 Hearing;
6. GHMC Chapter 17.76 – Boat Moorage;
7. City of Gig Harbor Shoreline Master Program
 - 3.05 Commercial Development
 - 3.06 Commercial Fishing Industry
 - 3.11 Marinas, Moorage Facilities, Piers, Docks and Floats
 - 3.13 Parking;
8. Findings & Conclusions of Hearing Examiner regarding Appeal 05-817;
9. Notification to City of Frisbie/Allen Brief Submission;
10. City Denial of Shoreline Exemption, dated November 7, 2005;
11. Rainier Yacht Harbor, LLC Appeal of City's 11/2/05 and 11/07/05 Denial of Exemption;
12. Rainier Yacht Harbor, LLC Brief in Opposition To Appeal 05-817;
13. City of Gig Harbor Statement of Complete Application Dated 7/27/05 (EXP 05-836) and 7/25/05 (EXP 05-832);
14. City of Gig Harbor Letter to Tomi Kent Smith stating no decision has been made as of 10/10/05 regarding Rainier Yacht Harbor, LLC Application;
15. Ordinance No. 1003;
16. Ordinance No. 1007;
17. Ordinance No. 1008;
18. Ordinance No. 1010;
19. Rainier Yacht Harbor, LLC letter to DNR dated 6/2/05, transmitting Baseline Engineering's survey of area to be leased from DNR under Lease Application No. 22-077053;
20. Lot 5 Declaration of Easement, recorded 5/24/05;
21. Statutory Warranty Deed to Rainier Yacht Harbor, LLC conveying Lot 5

and fronting 2nd class tidelands, recorded 5/24/05;

22. Jack Bolton, Land Survey of Lot 5 plus fronting tidelands and harbor area dated 10/1/81;
23. Rainier Yacht Harbor, LLC fax to DNR conveying sedimentation report supporting Rainier Yacht Harbor, LLC Lease Application No. 22-077053;
24. Rainier Yacht Harbor, LLC member agreement dated 10/27/04;
25. Rainier Yacht Harbor, LLC 11/10/04 DNR application to lease harbor area fronting Lots 6 and 7;
26. DNR letter dated 12/16/04 regarding lease Application No. 22-077053 to Rainier Yacht Harbor, LLC;
27. Rainier Yacht Harbor, LLC letter dated 1/5/05 to DNR;
28. Rainier Yacht Harbor, LLC letter to DNR dated 6/6/05;
29. DNR notes to file dated 6/10/05, written by Wynnae Wright, Land Manager, Washington State Department of Natural Resources;
30. Rainier Yacht Harbor, LLC Joint Use Maintenance Covenant recorded date 7/8/05;
31. Rainier Yacht Harbor, LLC brief in Opposition to Appeal 05-817;
32. WSDOE and William Lynn emails dated 12/27/05 regarding grading in Thurston, Snohomish Counties and the City of Olympia;
33. Photograph dated 12/17/05;
34. Photograph dated 12/17/05;
35. City of Gig Harbor Resolution No. 632 – HE Rules of Procedure;
36. RCW 90.58.030;
37. Boundary Line Revision Survey for Lots 5, 6 and 7;
38. Steel Residence Driveway;
39. Burton Residence Driveway;
40. Schematic Design for Total Project;

- 1 41. Letter and attachments from Rainier Yacht Harbor, LLC dated July 22nd.
- 2 2005 Kristin Riebli;
- 3 42. Rainier Yacht Harbor, LLC letter dated July 22, 2005, to Kristin Riebli;
- 4 43. Drawing of garage elevations;
- 5 44. APP 05-1143, Allen/Frisbie appeal of Administrative Decision;
- 6 45. APP 05-1144, Allen/Frisbie appeal of Administrative Decision;
- 7 46. Allen/Frisbie letter to City dated October 23, 2005;
- 8 47. Allen/Frisbie letter to City dated October 23, 2005;
- 9 48. City's Notices of Administrative Decision regarding DRB 05-832 (Steel)
- 10 and DRB 05-834 (Burton), both dated November 28, 2005;
- 11 49. Rainier Yacht Harbor, LLC's applications of Shoreline Permit Exemption
- 12 regarding EXP 05-837 (Burton) and EXP 05-836 (Steel), both dated July
- 13 11, 2005;
- 14 50. Rainier Yacht Harbor, LLC's letter dated July 11, 2005 and building
- 15 permit applications regarding BP 05-112 (Burton) and BP 05-111 (Steel);
- 16 51. Rainier Yacht Harbor, LLC's design review applications regarding DRB
- 17 05-832 (Steel) and DRB 05-834 (Burton);
- 18 52. WSDOE and William Lynn emails through 1/5/06;
- 19 53. 2003 International Building Code, Section 105;
- 20 54. E-mail dated January 13, 2006 from DNR;
- 21 55. Army Corps of Engineers letter dated January 18, 2006 and attachments
- 22 related to Application No. 200501001; and
- 23 56. Frisbie/Allen's computation of actual parking spaces attendant to homes
- 24 listed on Exhibit 61.

23 Submitted by Peter Katich:

- 24 57. Letter from Peter Katich to Hearing Examiner regarding Rainier Yacht
- 25 Harbor, LLC/Shoreline Permit Exemption File Nos. EXP 05-836 & 05-
- 837 for property at 3525 and 3555 Harborview Drive.

Submitted by Rainier Yacht Harbor:

58. E-mails from other jurisdictions regarding application of the single-family home shoreline exemption;
59. November 17, 2005 letter from Army Corp of Engineers;
60. Basement floor plan showing possible garage/basement use (Sheet A2.1);
61. "Pierce County Garage Sizes" sheet with supporting electronic Property Information Profiles;
62. Print-out from DOE website entitled, "Grading associated with SFR construction"; and
63. Colored building elevations for each proposed home (Sheets A4.1 and .2 for both Steel and Burton residences).

Submitted by City:

64. Community Development Department Staff Report (APP 05-1143 and 05-1144), dated January 11, 2006;
65. "Steel Residence and Burton Residence Surface Coverage Table," stamped received by City on 7-11-05;
66. Design Manual Checklist, stamped received by City on 7-11-05;
67. Building Permit application signed by Bruce Steel, received by City on 7-11-05 and plans for Steel and Burton Residence as follows:

- Sub (1) Plan Sheet G0.1 "Steel Residence"
- Sub (2) Plan Sheet G0.2 "Steel Residence"
- Sub (3) Plan Sheet C1.0 "Steel Residence"
- Sub (4) Plan Sheet C2.0 "Steel Residence"
- Sub (5) Plan Sheet C3.0 "Steel Residence"
- Sub (6) Plan Sheet C4.0 "Steel Residence"
- Sub (7) Plan Sheet C4.1 "Steel Residence"
- Sub (8) Plan Sheet C5.0 "Steel Residence"
- Sub (9) Plan Sheet C6.0 "Steel Residence"
- Sub (10) Plan Sheet C7.0 "Steel Residence"
- Sub (11) Plan Sheet C7.1 "Steel Residence"
- Sub (12) Plan Sheet A1.1L "Steel Residence"
- Sub (13) Plan Sheet A1.1 "Steel Residence"
- Sub (14) Plan Sheet A2.1 "Steel Residence"

Sub (15) Plan Sheet A2.2 "Steel Residence"
 Sub (16) Plan Sheet A2.3 "Steel Residence"
 Sub (17) Plan Sheet A2.4 "Steel Residence"
 Sub (18) Plan Sheet A4.1 "Steel Residence"
 Sub (19) Plan Sheet A4.2 "Steel Residence"
 Sub (20) Plan Sheet A5.1 "Steel Residence"
 Sub (21) Plan Sheet A5.2 "Steel Residence"
 Sub (22) Plan Sheet A6.1 "Steel Residence"
 Sub (23) Plan Sheet A6.2 "Steel Residence"
 Sub (24) Plan Sheet G0.1 "Burton Residence"
 Sub (25) Plan Sheet G0.2 "Burton Residence"
 Sub (26) Plan Sheet C1.0 "Burton Residence"
 Sub (27) Plan Sheet C2.0 "Burton Residence"
 Sub (28) Plan Sheet C3.0 "Burton Residence"
 Sub (29) Plan Sheet C4.0 "Burton Residence"
 Sub (30) Plan Sheet C4.1 "Burton Residence"
 Sub (31) Plan Sheet C5.0 "Burton Residence"
 Sub (32) Plan Sheet C6.0 "Burton Residence"
 Sub (33) Plan Sheet C7.0 "Burton Residence"
 Sub (34) Plan Sheet C7.1 "Burton Residence"
 Sub (35) Plan Sheet A1.1 "Burton Residence"
 Sub (36) Plan Sheet A1.1L "Burton Residence"
 Sub (37) Plan Sheet A2.1 "Burton Residence"
 Sub (38) Plan Sheet A2.2 "Burton Residence"
 Sub (39) Plan Sheet A2.3 "Burton Residence"
 Sub (40) Plan Sheet A2.4 "Burton Residence"
 Sub (41) Plan Sheet A2.4 "Burton Residence"
 Sub (42) Plan Sheet A2.5 "Burton Residence"
 Sub (43) Plan Sheet A4.1 "Burton Residence"
 Sub (44) Plan Sheet A4.2 "Burton Residence"
 Sub (45) Plan Sheet A5.1 "Burton Residence"
 Sub (46) Plan Sheet A6.1 "Burton Residence"

68. Letter from Bruce Steel to Rob White and Perry Fegley at City, dated 7-11-05, enclosing building permit applications;
69. Letter from Bruce Steel to Rob White and Perry Fegley at City, dated 7-11-05, requesting exemption from requirement to submit shoreline substantial development permits;
70. Application for exemption from shoreline substantial development permit received on 7-11-05;
71. Memo from "Workshop for Architecture and Design" unknown addressee, dated 7-8-05, received 7-11-05;

72. Design Review application dated 7-11-05;
73. Notice of Incomplete Application for Design Review dated 7-18-05 from City;
74. Notice of Incomplete Application for Application for Shoreline Exemption dated 7-18-05 from City;
75. Fax cover sheet from Kristin Riebli at City to Bruce Steel re: applications' Complete/Incomplete Notices;
76. Sheet with "C. Landscape Accent D. Concealed Downlight @ Entry", received 7-22-05;
77. Sheet with "Catalog Number Logic," received 7-22-05;
78. Sheet with "Louvered Step Star," received 7-22-05;
79. Sheet with "A. Driveway Bollard" received 7-22-05;
80. Two plan sheets identified as A1.1L for Burton Residence dated 7-11-05, received 7-22-05;
81. West elevation of Burton residence dated 7-22-05, received 7-22-05;
82. North elevation of Burton residence dated 7-22-05, received 7-22-05;
83. Sheet with "Burton & Steel Res. Drive and Conc. Walk color," received 7-22-05;
84. Sheet with "Bomanite Patterns," received 7-22-05;
85. Sheet with "Granite Textured Pattern," received 7-22-05;
86. Sheet with "Bornaite Pattern Selection Guide," received 7-22-05;
87. E-mail dated 7-21-05 from Jeff Becker to Bruce Steel re: grading quantities;
88. Notice of Incomplete Application for Design Review from 7-18-05 with handwritten notes;
- 89A Memo from Steven Bull to Kristen Riebli dated July 22, 2005 re: comments on 7-18-05 Notice of Incomplete Application.
- 89B. Letter dated 7/22/05 from Bruce Steel to Kristin Riebli;

90. Sheet "SW05-T21N-R02E", received 7-26-05;
91. Two sheets with "Metroscan/Pierce WA", received 7-26-05;
92. Grading Plan for Burton Residence, Sheet C4.0 from Layton and Sell;
93. Two page e-mail from John Vodopich to Bob Frisbie dated 8-01-05;
94. E-mail from John Vodopich to Rob White and Kristen Riebli dated 8-02-05;
95. E-mail from John Vodopich to Steve Ekberg dated 9-07-05;
96. E-mail from John Vodopich to Rob White dated 9-07-05;
97. E-mail from John Vodopich to Rob White and Kristen Riebli dated 9-16-05, transmitting an e-mail from Carol Morris to Bill Lynn dated 9-16-05;
98. E-mail to Kristin Moerler from Lita Dawn Stanton with nine page attachment, dated 9-19-05;
99. Letter from Kristin Moerler to Rainier Yacht Harbor dated September 26, 2005 re: comments on applications;
100. E-mail from Kristin Moerler to Bruce Steel dated 9-26-05, transmitting letter described above;
101. Letter from Bill Lynn to Kristin Moerler dated 10-5-05;
102. Aerial photo showing proposed Steel and Burton Residence;
103. Photo entitled "Across the street, not adjacent";
104. Photo entitled "Across the street, not adjacent";
105. Photo entitled "Across the street, not adjacent";
106. Photo entitled "Existing structure to be demolished";
107. Photo entitled "Photo of adjacent home A";
108. Photo entitled "Photo of adjacent home B";
109. Photo entitled "Photo of existing home A";

- 1 110. Aerial photo, unidentified;
- 2 111. Memo to John Vodopich from Chuck Hunter dated 9-30-05;
- 3 112. Letter to Chuck Hunter from John Vodopich dated 10-4-05;
- 4 113. Memo to Kristin Moerler from Steven Bull dated 10-5-05;
- 5 114. Letter to Kristin Moerler from Gary C. Allen dated 10-4-05;
- 6 115. Letter to Bruce Steel from Gary C. Allen dated 10-6-05;
- 7 116. Fax cover sheet from Bruce Steel to Kristin Moerler dated 10-6-05;
- 8 117. Letter to Mayor and Council from Tomi K. Smith dated 10-10-05;
- 9 118. Letter to Tomi K. Smith from J. Vodopich dated 10-10-05;
- 10 119. 9 color photos, undated and untitled;
- 11 120. 1 color photo with: "phone call 10-11-05 w/Steve Bull some windows";
- 12 121. 1 color photo with "TCR of window";
- 13 122. 1 color photo with "TCR of window," another view;
- 14 123. Letter to Kristin Moerler from B. Steel dated October 7, 2005;
- 15 124. Memo to Mayor and Council from J. Vodopich re: Steel/Burton
- 16 Residences, attaching seven pages;
- 17 125. Transmittal to Kristin Moerler from Dan Rusler dated 10-12-05;
- 18 126. Memo to Kristin Moerler from Steven Bull dated 10-14-05 (3 pages and
- 19 attaching 3 pages);
- 20 127. E-mail from Kristin Moerler to Steve Bull dated October 17, 2005;
- 21 128. Memo to Diane Gagnon from Dick Bower dated 10-17-05;
- 22 129. Letter to Bill Lynn from Kristin Moerler dated 10-18-05;
- 23 130. E-mail to Peter Katich from Kristin Moerler dated 10-20-05;
- 24 131. Letter to John Vodopich from Bruce Steel dated 6-3-05;
- 25

- 1 132. Letter to Kristin Moerler from Richard Allen and Bob Frisbie dated 10-
2 23-05, with attached exhibits referred to as Exhibits A - D;
- 3 133. Letter to Kristin Moerler from Bill Lynn dated 10-21-05;
- 4 134. E-mail to Kristin Moerler from Dan Rusler attaching copy of a plan
5 sheet A4.1;
- 6 135. Letter to Kristin Moerler from Richard Allen and Bob Frisbie dated 10-
7 27-05, attaching a copy of WAC 173-27-040;
- 8 136. E-mail from Kim Van Zwalenburg to Kristin Moerler dated 10-27-05
9 (two copies, one from Bob Frisbie;
- 10 137. E-mail from John Vodopich to Kim Van Zwalenburg dated 10-28-05;
- 11 138. Memo to City Planning Department from Lita Dawn Stanton;
- 12 139. List of Parties of Record;
- 13 140. Letter to Kristin Moerler from Kim Van Zwalenburg of DOE dated 11-
14 2-05;
- 15 141. City's Notice of Decision denying Shoreline Substantial Development
16 Permit dated 11-2-05;
- 17 142. E-mail from Kristin Moerler to Bruce Steel dated 11-2-05;
- 18 143. E-mail from Kristin Moerler to Lita Dawn Stanton dated 11-4-05;
- 19 144. Revised Notice of Decision denying Shoreline Substantial Development
20 Permit dated 11-7-05;
- 21 145. Memo to Mayor and City Council from City Attorney dated 11-7-05;
- 22 146. Letter to John Vodopich from Bill Lynn dated 11-7-05, attaching a copy
23 of an e-mail;
- 24 147. City's Administrative Interpretation dated November 14, 2005;
- 25 148. Letter to Rainier Yacht Harbor from Jennifer Sitts dated 11-14-05,
attaching three marked-up sheets;
149. Design Manual Checklist dated 11-22-05;

150. Letter from Bill Lynn to J. Vodopich and Michael Kenyon dated 11-7-05, with attachments (letter from DOE and Notice of Decision); Appeal of Notice of Decision;

151. Receipt for appeal fee;

152. Letter to John Vodopich and Michael Kenyon dated 11-8-05 from Bill Lynn;

153. E-mails to John Vodopich from Bob Frisbie dated 11-9-05;

154. Statement of Mailing of the Notice of Appeal and Public Hearing, dated 1-5-06;

155. 2nd Revised Notice of Decision Denial of Shoreline Substantial Development Permit Exemption dated 1-11-06;

156. Declaration of John Vodopich in Support of City's Denial of Shoreline Substantial Development Permit Exemption dated 1-10-06;

157. Declaration of Steve Osguthorpe in Support of City's Denial of Shoreline Substantial Development Permit Exemption dated 1-11-06;

158. Declaration of Ray Gilmore in Support of City's Denial of Shoreline Substantial Development Permit Exemption dated 1-10-06;

159. Declaration of Chris Hugo in Support of City's Denial of Shoreline Substantial Development Permit Exemption dated 1-11-06;

160. Frisbie/Allen letter, transmittal letter and witness list, dated 1-18-06;

161. Single Family Residence Exemption from DOE webpage; and

162. E-mail from Peter Katich to John Vodopich dated 1-17-06; response from Carol Morris; response from Peter Katich.

Submitted by City at Hearing:

163. Supplemental Community Development Department Staff Report (APP 05-1143 and 05-1144), dated January 18, 2006;

164. Memo from Lita Dawn Stanton to City of Gig Harbor regarding Burton/Steele Projects – Underground Garage, dated January 16, 2006; and

165. Memo from Lita Dawn Stanton to City of Gig Harbor regarding Burton/Steele Projects – Design Review Administrative Approval, dated January 16, 2006.

C. Pleadings. The Hearing Examiner considered the following pleadings:

1. Frisbie/Allen's Appeal Hearing Brief (APP 05-1143 & APP 05-1144), dated January 8, 2006;
2. Frisbie/Allen's Appeal Hearing Brief (APP 05-1143 & APP 05-1144), Revision 1a, dated January 15, 2006
3. Frisbie/Allen's Appeal Hearing Brief (APP 05-1143 & APP 05-1144), (Response to City's Eight (8) Page Planning Staff Statement), dated January 11, 2006;
4. Rainier Yacht Harbor LLC's Response to Design Review Appeals (APP 05-1143 & APP 05-1144), dated January 17, 2006;
5. Rainier Yacht Harbor LLC's Exhibit and Witness Lists (APP 05-817, 05-1143 & 05-1144), dated January 17, 2006;
6. Appeal Brief for Rainier Yacht Harbor, LLC (APP 05-1097);
7. Brief in Opposition to Appellant Appeal from Richard B. Allen and Robert G. Frisbie (APP 05-1097), January 8, 2006;
8. Brief in Opposition to Appellant Appeal from Richard B. Allen and Robert G. Frisbie – Rev. 1 (APP 05-1097), dated January 15, 2006;
9. City's Brief in Support of Denial of Shoreline Substantial Development Permit (APP 05-1097); and
10. City's Objection and Supplemental Brief in Support of Denial of Shoreline Substantial Development Permit Exemption, dated January 18, 2006.

D. Testimony. The following individuals provided testimony under oath:

1. Jennifer Sitts, Senior Planner;
2. Robert Frisbie;
3. Stephen Bull; and
4. Peter Katich.

III. DECISION ON APPEALS

A. Background.

This matter involves the timely appeal by Frisbie/Allen of two notices of administrative decisions approving design review (DRB 05-832 and 05-834), and the timely appeal by Rainier Yacht Harbor, LLC of the City's notice of decision denying two shoreline exemption requests (EXP 05-836 and 05-837), all of which relate to Rainier Yacht Harbor's pending applications to construct two separate single-family homes on property located at 3525 and 3555 Harborview Drive, in the City of Gig Harbor. The Examiner previously ruled on another appeal involving this same property and these same parties. Ex. 8.

B. Applicable Legal Principles.

Municipal ordinances are the equivalent of statutes, so they are evaluated under the same rules of construction. *Faben Point Neighbors v. City of Mercer Island*, 102 Wn. App. 775, 11 P.3d 322 (2000). When interpreting statutes, the words in the statutes are given their plain meaning. *City of Lakewood v. Pierce County*, 106 Wn. App. 63, 71, 23 P.3d 1 (2001). If the statutory language is ambiguous, common tools of statutory construction and interpretation are used to ascertain and give effect to the Legislature's intent and purpose. Absent ambiguity or a specific statutory definition, however, words are simply given their dictionary meanings. *Id.*

Likewise, a well-established rule of statutory construction provides that considerable judicial deference should be given to the construction of an ordinance by those officials charged with its enforcement. *Mall, Inc. v. City of Seattle*, 108 Wn.2d 369, 739 P.2d 668 (1987). In the context of a zoning case, the Washington Supreme Court has explained the reasons for this rule of deference as follows:

The primary foundation and rationale for this rule is that considerable judicial deference should be accorded to the special expertise of administrative agencies. Such expertise is often a valuable aid in interpreting and applying an ambiguous statute in harmony with the policies and goals the legislature sought to achieve by its enactment. At times, administrative interpretation of a statute may approach lawmaking, but we have heretofore recognized that it is an appropriate function for administrative agencies to "fill in the gaps" where necessary to the effectuation of a general statutory scheme. . . . It is likewise valid for an administrative agency to "fill in the gaps" via statutory construction – as long as the agency does not purport to 'amend' the statute.

Hamma Hamma Co. v. Shorelines Hearings Board, 85 Wn.2d 441, 448, 536 P.2d 157 (1975). At times, "a literal reading must sometimes give way to the spirit or intent of the

1 legislation to 'avoid unlikely, strained or absurd consequences which could [otherwise]
2 result.'" *Mall, Inc.*, 108 Wn.2d at 379.

3 C. Findings of Fact.

4 Allen/Frisbie Design Review Appeals (DRB 05-832 and 05-834)

5 1. On July 11, 2005, Applicant Rainier Yacht Harbor, LLC ("Rainier Yacht")
6 applied for design review approval for two proposed single-family structures located at
7 3525 and 3555 Harborview Drive, Gig Harbor Washington.

8 2. On November 28, 2005, the City issued two Notices of Administrative
9 Decisions approving Design Review applications 05-832 and 05-834 for the two
10 proposed single-family homes. All applications filed were for single-family residences.
11 While the single-family homes are large, and the basement/garages could accommodate a
12 variety of vehicles, they were proposed as single-family homes and reviewed by the City
13 as single-family homes.

14 3. On December 5, 2005, the City received an appeal of the Notices of
15 Administrative Decisions from Robert Frisbie and Richard Allen ("Frisbie"). Frisbie
16 asserts that portions of the basement/garages for the two proposed homes would rise
17 above grade in a required yard, contrary to the Examiner's earlier ruling requiring all
18 such structures be underground. Exs. 44 - 45.

19 4. If the determination of whether a structure is "underground" was made from
20 existing grade, then Frisbie's appeal would be well taken. If that determination is made
21 from finished grade, however, then the appeal would be denied. The Examiner's prior
22 decision in APP 05-817 does not address the distinction between existing and finished
23 grade. Here, although the Gig Harbor Municipal Code is not crystal clear, the City has
24 reasonably interpreted existing code provisions to provide for measurement from finished
25 grade. Ex. 64. The City's determination in that regard is entitled to deference.

5. Portions of the basement/garage structures for the proposed single-family
residences would be above the *existing* grade. All portions of the basement/garage
structures within the required yards will be below the level of the *finished* grade upon
completion of construction.

6. The definition of "yard" in GHMC Section 17.04.880 is:

A required *open space* that is on the same lot with the
principal use and is *unoccupied or unobstructed by any
portion of a structure*; provided however, that paved
terraces, fences, walls, poles, posts, ornaments, furniture
and other customary yard accessories may be permitted in
any yard subject to height limitations and requirements

limiting the obstruction of visibility at intersections.
[Emphasis added.]

7. The definition of "structure" in GHMC Section 17.04.770 is:

A combination of materials that is constructed or erected, *either on or under the ground*, or that is attached to something having a permanent location on the ground, excluding residential fences, retaining walls, rockeries and similar improvements of a minor character the construction of which is not regulated by the building code of the City.
[Emphasis added.]

8. Compliance with the above-cited code sections is to be determined based on finished grade and not existing grade. After completion of the homes as proposed, no portion of the basement/garage structures will extend above-ground into a required yard. The required yards will be unobstructed upon completion of the home and finished grading, rendering the construction of the homes consistent with the Hearing Examiner's ruling set forth in Ex. 8.

9. Measuring from the pre-existing ground level could lead to strained and absurd results. For example, a lot owner might propose to lower the grade of its property in the construction process. In that event, a portion of the structure to be located in a required yard could be below the elevation of the pre-existing ground, but above the elevation of the finished grade. This would create the absurd result that such structure would be permissible because it is below existing grade, but would extend above finished grade level into a required yard.

10. No extraordinary grading is proposed here. This proposal preserves the natural topography, which is the standard required by city code. GHMC 17.99.240(C); Ex. 64.

11. Appellants also argue that the single-family homes exceed the 3,500 square foot building floor area maximum for commercial development in the Waterfront Millville ("WM") zone. This appeal was made from the City's approval of the design under Chapter 17.99 GHMC.

12. Such design review is limited to the provisions of that chapter. The provision cited by Appellants, GHMC 17.48.040(I), is reviewed by the City in conjunction with the building permits and is not a part of the design review. Therefore, it cannot be part of the appeal from this design review decision and the Examiner lacks jurisdiction to rule.

13. Accordingly, the Examiner concludes that the City's decisions on design review are affirmed. As previously set forth in the Examiner's ruling in APP 05-817, structures within a required yard must be constructed underground. The determination of whether such structure is underground is measured from finished grade.

Rainier Yacht Harbor Shoreline Exemption Denial (EXP 05-836 and 05-837)

14. During the pre-hearing telephonic conference, Rainier Yacht objected to the admission of certain declarations from various planning professionals submitted by the City regarding the shoreline exemption denial, on the basis that the declarants might not be available for cross-examination. Exs. 156 - 159. The Examiner requested briefing on the issue. The City submitted a brief. Similar to the City's declarations, Rainier Yacht submitted e-mails from other planning professionals. Ex. 58. All exhibits were admitted under Rule 12 of the Examiner's Rules of Procedure.

15. During the pre-hearing telephonic conference, Rainier Yacht also objected to the City's amendment of the rationale for its shoreline exemption denial. The City's decision at all times remained denial. Rainier Yacht was offered the opportunity to continue the hearing in order to more fully prepare. Rainier Yacht declined, and indicated that it wished for the hearing to go forward as scheduled on January 18, 2006.

16. Rainier Yacht owns property that is in the WM zoning classification and also within the jurisdiction of the City Shoreline Master Program. The WM district permits a variety of commercial and residential uses.

17. Rainier Yacht formed to develop the property, and hired Architect Steven Bull to begin developing plans for a mixed-use project. The project would consist of two buildings constructed over a single underground parking garage and was to include offices, condominiums, and a marina.

18. Rainier Yacht took steps to advance its proposal through the various agencies that would have to approve it, including the Corps of Engineers, the Department of Natural Resources, and the City of Gig Harbor. To this end, Rainier Yacht's architect developed plans to a conceptual stage, sufficient to allow the jurisdictions to undertake a preliminary review.

19. Rainier Yacht met with City staff in a pre-application conference on May 12, 2005. At the pre-application conference, Rainier Yacht presented its plans to the City for review.

20. At approximately the same time, the City Council had begun the consideration of new land use controls designed to limit the amount of building space allowed in the WM zone. On May 31, 2005, the City Council adopted Ordinance 1003, which established a moratorium on the acceptance of applications for new development and redevelopment of non-residential structures in the WM district. Ex. 15. The moratorium effectively stopped Rainier Yacht or anyone else from submitting permit applications for non-residential development in the WM zone.

21. Rainier Yacht instructed its architect, Mr. Bull, to change the plans from a proposed mixed-use development to two single-family homes, one for Mr. Steel and the other for Mr. Burton, both members of Rainier Yacht. Rainier Yacht instructed its

1 architect to use the existing plans to the greatest extent possible, and the original plans
2 already included a residential use component of the proposed mixed-use development.

3 22. Mr. Bull was instructed by Rainier Yacht to get complete building permit and
4 other applications filed with the City by July 11, 2005. Mr. Bull did submit a building
5 permit application, design review application, and a request for Shoreline Substantial
6 Development Permit Exemption for each proposed home.

7 23. On July 25, 2005, the City adopted Ordinance 1008, limiting the maximum
8 gross floor area, including attached and detached garages, to 3,500 sq. feet per lot for all
9 commercial and residential structures in the WM district. Ex. 17.

10 24. The submitted and processed application materials characterize the proposed
11 buildings as single-family homes. While the proposed homes are large (the Burton
12 residence is 8,022 total square feet, including 3,650 sq. feet for the basement, and the
13 Steel residence is 9,642 sq. feet, including 5,150 sq. feet for the basement), applications
14 were neither filed nor processed by the City for any commercial use.

15 25. At the time the plans were submitted, the City's Community Development
16 staff advised Mr. Bull orally that the single-family homes would be exempt from the
17 requirement for a Substantial Development Permit. This was not a formal determination
18 by the City, and the express terms of city code require that any such formal determination
19 be in writing. In its review of the applications, the Department of Ecology ("DOE")
20 issued a letter dated November 2, 2005 stating that the Burton and Steel proposals
21 included too much grading to be considered exempt under the Shoreline Management Act
22 and related regulations. Based upon this letter, and citing only the grading, the City
23 issued a Notice of Decision on November 2, 2005 stating that the Burton and Steel homes
24 were not exempt.

25 26. As members of Rainier Yacht, Mr. Steel and Mr. Burton timely appealed that
determination. As its appeal is finally postured after allowing for the City's revised
rationale for denying the exemption, Rainier Yacht generally claims that the statute and
administrative code exempt single-family homes and garages (as a normal appurtenance)
categorically, without regard to the size or potential other uses of a garage. The City and
Frisbie generally respond that garage/basements of these proposed sizes are not "normal"
appurtenances, and that these homes are merely a pretext designed to avoid the otherwise
applicable requirement to obtain a shoreline substantial development permit before
converting the homes to a marina or other commercial use.

27. Subsequently, the Department of Ecology wrote an e-mail on January 5, 2006
(Ex. 52) stating that its earlier correspondence regarding excessive grading was
inaccurate and contrary to the Department's published guidance, but that the Department
still believed the garage areas were too large. The City issued a 2nd Revised Notice of
Decision dated January 11, 2006 (the first revised notice simply corrected a typographical
error). The 2nd Revised Notice continued to maintain that the proposed homes were not
exempt from the requirement for a Substantial Development Permit, this time on the

1 bases that the garages were too large to be considered "normal appurtenances" and that
 2 the driveway would be used for "commercial purposes." The parties agreed, and the
 3 Examiner ordered, at the pre-hearing telephone conference, that no new appeal or other
 4 document was required in order for Rainier Yacht to challenge this 2nd Revised Decision.

5 28. Rainier Yacht was not required by city code to show, and did not show, on
 6 the submitted plans detailed information as to how the full extent of the
 7 basements/garages would be used (although Rainier Yacht did satisfy the code
 8 requirement to provide two parking stalls for each single-family residence).

9 29. The basement areas could be used for a variety of purposes including work
 10 shops, storage areas, wine cellars, game rooms, or home theatres, as well as car and boat
 11 storage.

12 30. The project architect, Mr. Bull, testified that underground basement and/or
 13 garage areas as large or larger than the home (like those proposed here) are more
 14 common where, as on this site, property values are high and the topography is steep. City
 15 staff testified that underground parking is one, if not the only, practical alternative on this
 16 site, given the applicable regulations and site conditions.

17 31. The lot size and topography here support a single entrance to the garage,
 18 requiring that a portion of the underground garage area is taken up by a driveway area to
 19 facilitate entry into the available parking spots for cars and boats.

20 32. Other large homes exist in the area, including homes across Gig Harbor Bay
 21 and elsewhere on the Gig Harbor Peninsula. These larger homes generally have large
 22 multi-car detached garages in addition to the large home area. Ex. 61. Messrs. Frisbie
 23 and Allen testified that those large homes have garages that typically hold no more than
 24 three cars. Ex. 56.

25 33. The Burton and Steel homes would be served by a joint driveway. There is
 also an existing 10-foot driveway on the east side of the Burton lot. That driveway serves
 an existing pier, and a float that has had commercial use for many years. The pier is now
 owned by Rainier Yacht, and the float is owned by the former owner of the Rainier Yacht
 property. The Burton house is proposed to be located five feet from the east property
 line, and would eliminate the existing driveway. Rainier Yacht proposes that the joint
 residential driveway serving the Burton and Steel homes would also be used to provide
 access to the float.

34. The float owner currently has an easement over the existing 10-foot
 driveway, and that easement permits the relocation of the driveway so long as access to
 the float is maintained. Ex. 20.

35. The proposed joint driveway to serve the Steel and Burton homes terminates
 at a point between the Burton house (past the basement/garage entrance) and the pier.
 This portion of the driveway is designed to serve the Burton house. Without any physical

change to the proposed driveway, it can also serve as access to the pier.

36. The proposal for the Burton-Steel driveway to also serve the float will not change the use of the float. Since the proposed joint use driveway is approvable for single-family homes and does not alter the use of the float, it does not change the proposal from single-family residential to commercial. These applications do not involve any construction or exterior alteration to the float or its pre-existing use.

37. Messrs. Frisbie and Allen presented a significant amount of evidence regarding Rainier Yacht's undisputed plans to obtain approval for a marina, and paints a convincing picture that Rainier Yacht may try in the future to convert these homes to a marina or other permissible commercial use. Most of the evidence cited by Mr. Frisbie and Mr. Allen, however, relates to actions taken by Rainier Yacht prior to the adoption of Ordinance 1003, and Rainier Yacht's subsequent change of its development proposal from mixed-use commercial to single-family residential. There is evidence that Rainier Yacht's application for a Corps of Engineers permit (necessary for the marina proposed as part of Rainier Yacht's earlier mixed-use proposal) has been withdrawn but may be re-submitted later this year. There is also evidence that Rainier Yacht's application for a DNR tidelands lease has not been withdrawn. A tidelands lease, without more, is consistent with a single-family residential use of the property since such a lease would be required for pleasure craft or other single-family moorage that extends over tidelands. In any event, and despite what Rainier Yacht may, or may not, intend for the future, Rainier Yacht's single-family residential proposals have been submitted and processed consistent with city code applicable at the time of submittal.

38. The Shoreline Management Act of the State of Washington prohibits anyone from undertaking a "substantial development" on the shorelines of the state unless a permit is first obtained from the local jurisdiction. RCW 90.58.140(2). "Substantial development" is defined in RCW 90.58.030(3)(e) as excluding:

Construction on shorelands by an owner, lessee or contract purchaser of a single family residence for his own use or for the use of his or her family, which residence does not exceed a height of thirty-five feet above average grade level and which meets all requirements of the state agency or local government having jurisdiction thereof, other than the requirements imposed pursuant to this chapter.

RCW 90.58.030(3)(e)(vi). The administrative rules interpreting the above provide that "exemptions shall be construed narrowly." WAC 173-27-040. "Only those developments that meet the precise terms of one or more of the listed exemptions may be granted exemption from the substantial development permit process." *Id.*

39. The applicant bears the burden to demonstrate that a development or use is exempt. WAC 173-27-040(1)(c). If any part of the proposed exemption is not eligible for exemption, then a substantial development permit is required for the entire proposed development project. WAC 173-27-040(1)(d).

1 40. The administrative rule corresponding to RCW 90.58.030(3)(e)(vi) for single-
2 family residences reads as follows:

3 Construction on shorelands by an owner, lessee, or contract
4 purchaser of a single-family residence for their own use or
5 the use of their family, which residence does not exceed a
6 height of thirty-five feet above average grade level and
7 which meets all requirements of the state agency or local
8 government having jurisdiction thereof. 'Single-family
9 residence' means a detached dwelling designed for and
10 occupied by one family including those structures and
11 developments within a contiguous ownership, which are a
12 normal appurtenance. An 'appurtenance' is necessarily
connected to the use and enjoyment of a single-family
residence . . . On a statewide basis, normal appurtenances
include a garage; deck; driveway; utilities; fences;
installation of a septic tank and drainfield and grading
which does not exceed two hundred fifty cubic yards . . .
Local circumstances may dictate additional interpretations
of normal appurtenances which shall be set forth and
regulated within the applicable master program . . .

13 WAC 173-27-040(2)(g).

14 41. The City of Gig Harbor Shoreline Master Program ("SMP") does not include
15 local interpretation of exemptions or normal appurtenances. The City's SMP does
16 provide that any shoreline exemption granted may be conditioned to ensure that the
activity is consistent with the Master Program and the Shoreline Management Act. SMP
Sec. 4.05; WAC 173-27-040(1)(e).

17 42. Rainier Yacht asserts that the residence located at 3525 Harborview Drive
18 will be constructed for the use of Mike Burton and his family, as a single-family
19 residence and garage appurtenant to a single-family residence, as allowed under WAC
173-27-040(g). Ex. 5. This residence is 4,258 square feet in size, with a basement
garage of 3,650 square feet.

20 43. Rainier Yacht asserts that the residence located at 3555 Harborview Drive
21 will be constructed for the use of Bruce Steel and his family, as a single-family residence
22 and garage appurtenant to a single-family residence, as allowed under WAC 173-27-
040(g). Ex. 5. This residence is 4,917 square feet in size, with a basement garage of
5,150 square feet.

23 44. The two structures do not exceed a height of 35 feet above average grade
24 level.

1 45. A driveway is proposed to provide access to the garages of both single-family
2 residences as well as a commercial fishing dock that is partially on the lot at 3525
Harborview Drive.

3 46. The proposed driveway will access Harborview Drive along the west
4 boundary of 3555 Harborview Drive, and run down the west boundary line and the
bulkhead. The driveway extends almost the entire north side of the property with the
exception of about 50 feet. The driveway will be concrete and 20 feet wide.

5 47. The owner of the Burton and Steel properties is Rainier Yacht Harbor, LLC,
6 and it purchased the properties subject to a "Declaration of Easement and the Terms and
7 Conditions Thereof," dated May 20, 2005. Ex. 20. The Declaration of Easement will
provide an easement for ingress and egress to the Jerkovichs (sellers) from Harborview
8 Drive to the existing dock. *Id.* The easement "is intended to include, without limitation,
commercial uses relating to the fishing and maritime industries." *Id.*

9 48. On July 25, 2005, the City of Gig Harbor adopted Ordinance 1008, which
10 imposed square footage and footprint limitations on the size of structures in the WM
zone. Ex. 17. The new square footage limitations for single-family residences and
11 nonresidential structures are 3,500 square feet.

12 49. On November 2, 2005, the City received a letter from Kim Van Zwalenburg
13 of the Department of Ecology ("DOE"), which provides DOE's interpretation of RCW
90.58.030(3)(e)(vi) and WAC 173-27-040(2)(g) that the garages associated with the two
14 single-family residences are not normal appurtenances to a single-family residence, and
as a result, the exemption should be denied. Ex. 76.

15 50. On November 2, 2005, the City of Gig Harbor issued a Notice of Decision of
16 Denial of Shoreline Substantial Development Permit Exemption. In this Decision, the
City based the denial on excessive grading.

17 51. On November 7, 2005, the Notice of Decision was revised to correct a
18 typographical error in the Findings of Fact. The Decision was unchanged.

19 52. On December 27, 2005, Kim Van Zwalenburg sent an e-mail to Bill Lynn,
20 attorney for the applicants. Ex. 52. In that e-mail, Ms. Van Zwalenburg states that Mr.
Lynn informed her that the garages will likely be used by the owner for a variety of
21 purposes.

22 53. On January 5, 2006, Kim Van Zwalenburg wrote another e-mail to Bill Lynn:

23 I disagree with your conclusion that the garages, as
24 presently proposed, could be considered normal
appurtenances to a single family residence. As I stated
25 below and in earlier e-mails, and as various elements of the
file seem to indicate, the garages are proposed to be

constructed in a manner that will accommodate large numbers of vehicles or as you stated at one point: 'likely be used by the owner for a variety of purposes.' If the property owners are now limiting their development to two single family residential structures for residential uses only, and limiting site impacts to those necessary for constructing the homes, then a shoreline exemption may be appropriate.

Absent clear assurance that this development is limited to residential uses, I cannot agree that the proposals meet the criteria for an exemption. Per WAC 173-27-040 exemptions are to be construed narrowly and the burden of proof that a development or use is exempt from the permit process is on the applicant.

Ex. 52.

54. On January 11, 2006, the City issued a 2nd Revised Notice of Decision, changing the rationale for it shoreline exemption denial. The decision of denial was unchanged.

55. The criteria applicable to the Hearing Examiner's Decision are set forth in the statutes, administrative rules set forth above, and Section 4.05 of the Shoreline Master Program. In Section 4.05 SMP and the statutes/rules cited above, one additional criterion for approval is a determination that the development is consistent with the Shoreline Management Act, the Shoreline Master Program and "other applicable City, State or Federal Permit requirements."

56. The appellant has the burden to prove that the applications are exempt from the shoreline substantial development permit requirement. WAC 173-27-040(1)(c). In support of its argument that the City erroneously denied the exemption, Rainier Yacht argues:

1. The statute expressly exempts single-family homes from the requirement for a substantial development permit, and it is not limited to any size or shape.
2. To the extent that there is any room to limit the size of an appurtenance, it would have to be done by code, and not on an ad hoc basis.
3. The City does not have the authority to limit the exception created by the legislature for single family homes.

1 4. The City's decision is based on what is "normal," which
is unconstitutionally vague.

2 5. The regulation states that a home, including a "normal
3 appurtenance" like a garage, is exempt. It does not state
4 that only "average-sized garages" or "normal-sized
garages" are exempt.

5 6. Not all of the basement area in the homes will be used
6 for a garage, but even if they were, they would not be of
exceptional size for large, expensive homes.

7 7. The driveways are designed only to serve the exempt
8 houses and any commercial use is incidental as well as a
pre-existing nonconforming use.

9 57. All of the witnesses who testified were credible. Disagreements involved the
10 interpretation or application of the many exhibits in this record.

11 58. Consistent with then-existing city code, Rainier Yacht in fact had earlier
12 begun the process to permit a marina and other commercial uses on its property. The
13 City's adoption of a moratorium on non-residential applications in the WM zone put an
14 end to those plans for commercial development. Rainier Yacht directed its architect to
15 modify the existing plans in order to vest residential development applications under the
City's then-existing code. Rainier Yacht did so. Rainier Yacht did not testify or
otherwise offer proof whether it intended to apply in the future to convert the two
proposed residences to a marina or other commercial uses.

16 59. Rainier Yacht's applications, by their terms and according to the testimony of
17 its architect, Mr. Bull, are designed for single-family residences. As it must, the City
18 processed those applications under the codes applicable to single-family residences.
Nothing in applicable city code would prohibit the proposed driveway or the size of the
basement/garage structures proposed for the two residences.

19 60. While the terms of the purchase of the property by Rainier Yacht from its
20 seller include the reservation of an easement allowing the seller to continued access to a
21 float for, among other things, continued "commercial purposes," Rainier Yacht's
proposed development of two single-family residences does not impact or affect that pre-
existing commercial use.

22 61. Likewise, at least since the adoption of Ordinance 1003 on May 31, 2005,
23 applications and other written material submitted by Rainier Yacht and processed by the
24 City have been limited exclusively to single-family residential uses.

25 62. Under Section 4.05 of the City's SMP, and under WAC 173-27-040 (1)(e),
the grant of a shoreline exemption may be conditioned to ensure consistency with the

Shoreline Management Act and the City's Master Program. If Rainier Yacht had applied for a commercial development, no exemption could be granted and a shoreline substantial development permit would be required.

IV. JURISDICTION AND STANDARDS OF REVIEW

A. Frisbie/Allen Design Review Appeals. The Examiner has jurisdiction to rule on appeals of administrative decisions pursuant to GHMC 19.01.003. The standard of review to be applied by the Examiner in considering the Frisbie/Allen design review appeals is set forth in GHMC 19.05.006, which provides that the burden of proof is on the appellants.

B. Rainier Yacht Harbor Appeal of Shoreline Exemption Denial. The Examiner has jurisdiction to rule on appeals of administrative decisions pursuant to GHMC 19.01.003. The standard of review to be applied by the Examiner in considering the Rainier Yacht Harbor appeal of the shoreline exemption denial is set forth in Section 4.05 of the Shoreline Master Program, and guided by WAC 173-27-040, and RCW 90.58.

V. DECISION

A. Frisbie/Allen Design Review Appeals. The Examiner affirms the City's administrative decisions on design review (DRB 05-832 and 05-834), as those decisions are set forth in Exhibit 48.

B. Rainier Yacht Harbor Appeal of Shoreline Exemption Denials. The Examiner reverses the City's administrative decisions denying shoreline exemptions for two single-family residences, and approves the exemptions. This approval is conditioned to require that, if constructed, the two proposed single-family residences remain used as single-family residences. In the event that Rainier Yacht Harbor, its members, or any of their respective successors seek to change the use from single-family residential, a shoreline substantial development permit (and any other then-required permits or approvals) must first be obtained.

VI. PARTIES OF RECORD

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VII. APPEAL OF EXAMINER'S DECISION

A. Frisbie/Allen Design Review Appeals. Pursuant to GHMC 19.01.003 as amended by Ordinance No. 903, any party of record with standing to file a land use petition and desiring to appeal the Examiner's decision related to the Frisbie/Allen appeals of DRB 05-832 and 05-834 may do so within 21 days of the issuance of this decision by filing an appeal with the Pierce County Superior Court, pursuant to the provisions of the Land Use Petition Act, RCW 36.70C.

B. Rainier Yacht Harbor Shoreline Exemption Appeal. Any party of record with standing and desiring to appeal the Examiner's decision on the shoreline exemption requests may do so within the time and in the manner provided by state law for appeals to the Shoreline Hearings Board.

DATED this 11 day of February, 2006.

KENYON DISEND, PLLC

By 
Michael R. Kenyon, Hearing Examiner

DECLARATION OF SERVICE

I, Margaret Starkey, declare and state:

1. I am a citizen of the State of Washington, over the age of eighteen years, not a party to this action, and competent to be a witness herein.

2. On the 10th day of February, 2006, I served a true copy of the foregoing Findings, Conclusions and Decision on the following parties of record using the method of service indicated below:

ORIGINAL TO:

Jennifer Sitts, Senior Planner
City of Gig Harbor
3510 Grandview Street
Gig Harbor, WA 98335

☒ First Class, U.S. Mail, Postage Prepaid
☐ Legal Messenger
☐ Overnight Delivery
☐ Facsimile
☒ E-Mail

COPIES TO:

Robert G. Frisbie, P.E.
9720 Woodworth Avenue
Gig Harbor, WA 98332

☒ First Class, U.S. Mail, Postage Prepaid
☐ Legal Messenger
☐ Overnight Delivery
☐ Facsimile
☒ E-Mail

Richard B. Allen
3603 Ross Avenue
Gig Harbor, WA 98332

☒ First Class, U.S. Mail, Postage Prepaid
☐ Legal Messenger
☐ Overnight Delivery
☐ Facsimile
☐ E-Mail

Bruce Steele
Mike Burton
Rainier Yacht Harbor, LLC
P.O. Box 875
Tacoma, WA 98401

☒ First Class, U.S. Mail, Postage Prepaid
☐ Legal Messenger
☐ Overnight Delivery
☐ Facsimile
☐ E-Mail

William T. Lynn
Gordon, Thomas, Honeywell,
Malanca, Peterson & Daheim LLP
P.O. Box 1157
Tacoma, WA 98401-1157

☒ First Class, U.S. Mail, Postage Prepaid
☐ Legal Messenger
☐ Overnight Delivery
☐ Facsimile
☒ E-Mail

1 Carol A. Morris
 2 Law Office of Carol A. Morris, P.C.
 3 P.O. Box 948
 4 Seabeck, WA 98380-0948

☒ First Class, U.S. Mail, Postage Prepaid
☐ Legal Messenger
☐ Overnight Delivery
☐ Facsimile
☒ E-Mail

5 Peter Katich
 6 3509 Ross Avenue
 7 Gig Harbor, WA 98332

☒ First Class, U.S. Mail, Postage Prepaid
☐ Legal Messenger
☐ Overnight Delivery
☐ Facsimile
☐ E-Mail

8 Lita Dawn Stanton
 9 111 Raft Island
 10 Gig Harbor, WA 98335

☒ First Class, U.S. Mail, Postage Prepaid
☐ Legal Messenger
☐ Overnight Delivery
☐ Facsimile
☐ E-Mail

11 Carol Davis
 12 3312 Harborview Drive.
 13 Gig Harbor, WA 98332

☒ First Class, U.S. Mail, Postage Prepaid
☐ Legal Messenger
☐ Overnight Delivery
☐ Facsimile
☐ E-Mail

14 Brenda Davidson
 15 3808 Harborview Drive
 16 Gig Harbor, WA 98332

☒ First Class, U.S. Mail, Postage Prepaid
☐ Legal Messenger
☐ Overnight Delivery
☐ Facsimile
☐ E-Mail

17 Carolyn S. Dupille
 18 3526 Harborview Drive
 19 Gig Harbor, WA 98332

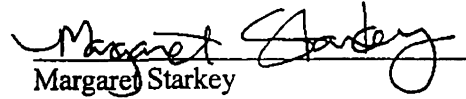
☒ First Class, U.S. Mail, Postage Prepaid
☐ Legal Messenger
☐ Overnight Delivery
☐ Facsimile
☐ E-Mail

20 Steven Bull
 21 1502 25th
 22 Seattle, WA 98144

☒ First Class, U.S. Mail, Postage Prepaid
☐ Legal Messenger
☐ Overnight Delivery
☐ Facsimile
☐ E-Mail

1 I declare under penalty of perjury under the laws of the State of Washington that the
2 foregoing is true and correct.

3 DATED this 10th day of February, 2006, at Issaquah, Washington.

4 
Margaret Starkey

APPENDIX B
-REVISED NOTICE OF DECISION-
AR 144; Clerks Papers 910-11



"THE MARITIME CITY"

COMMUNITY DEVELOPMENT DEPARTMENT

REVISED NOTICE OF DECISION DENIAL OF SHORELINE SUBSTANTIAL DEVELOPMENT PERMIT EXEMPTION

A Notice of Decision was issued in November 2, 2005, to Rainier Yacht Harbor, LLC for the denial of the Shoreline Substantial Development Permit Exemption Request for the Burton Residence and Steel Residence. This revision supersedes the Notice of Decision issued on November 2, 2005.

Date: November 7, 2005
Applicant: Rainier Yacht Harbor, LLC
Bruce Steel, Managing Member
Norpoint Communities
2323 North 31st Street, Suite 200
P.O. Box 875
Tacoma, WA 98401
Re: *Shoreline Exemption Requests (EXP 05-837 and EXP 05-836)*

I. Findings of Fact. The applicant has submitted the following facts in support of a request for a shoreline substantial development permit exemption for the single family residences located at 3525 and 3555 Harborview Drive:

1. The residence located at 3525 Harborview Drive will be constructed for the use of Mike Burton and his family, for use as a single family residence and garage appurtenant to a single family residence, as allowed under WAC 173-27-040(g).
2. The residence located at 3555 Harborview Drive will be constructed for the use of Bruce Steel and his family, for use as a single family residence and garage appurtenant to a single family residence, as allowed under WAC 173-27-040(g).
3. The two residences do not exceed a height of 35 feet above average grade level.
4. Grading on site for the garages appurtenant to the proposed single family residences exceeds 1500 cubic yards of material for each residence.
5. On November 2, 2005, the City received a letter from Kim Van Zwahlenburg of the Department of Ecology, which provides DOE's interpretation of WAC 173-27-040(g) that any grading exceeding ~~1500~~ 250 cubic yards of material for a single family residence requires a shoreline substantial development permit. This letter includes additional rationale for DOE's opinion that a shoreline substantial development permit is required.

II. Conclusions.

HEX EXHIBIT# 144
APPEAL NOS. 05-1097, 05-1143, 05-1144

Threshold Decision: Permit is exempt from SEPA per WAC 197-11-800(1)(b)(i)

Based on WAC 173-27-040(g), grading for a single family residence which exceeds 1500 250 cubic yards of material requires a shoreline substantial development permit. The permit application materials demonstrate that grading for each single family residence associated with the construction of the large garages exceeds 1500 cubic yards of material. The requests for exemptions EXP 05-837 and EXP 05-836 are denied. The applicant is required to submit shoreline substantial development permit applications for the development(s).

III. Appeals.

This decision may be administratively appealed to the Gig Harbor Hearing Examiner pursuant to the procedures in Section 4.10 of the City's Shoreline Master Program, within ten days following the issuance of this Notice of Decision.

IV. Distribution.

This Notice of Decision shall be provided to the following persons:

Rainier Yacht Harbor, LLC
Bruce Steel, Managing Member
P.O. Box 875
Tacoma, WA 98401

Richard B. Allen and
Bob Frisbie
3603 Ross Avenue
Gig Harbor WA 98332

Lita Dawn Stanton
111 Raft Island
Gig Harbor WA 98335

Kim Van Zwahlenburg
Shoreline Specialist
Department of Ecology - Southwest
Regional Office
PO Box 47775
Olympia WA 98504-7775

Chuck Hunter
8829 Franklin Avenue
Gig Harbor WA 98332

Pierce County Assessor
2401 South 35th Street Room 142
Tacoma, WA 98409

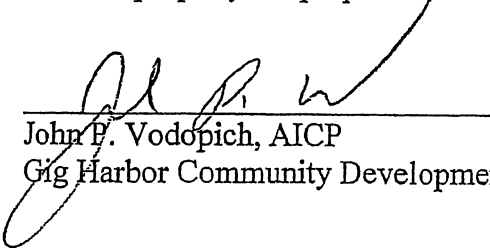
Tomi Kent Smith
3414 Harborview Drive
Gig Harbor WA 98332

Peter Katich
3509 Ross Avenue
Gig Harbor WA 98332

V. RCW 36.70B.130 requires that every Notice of Decision state that affected property owners may request a change in valuation for property tax purposes notwithstanding any program of revaluation.

Date

11/7/05


John P. Vodopich, AICP

Gig Harbor Community Development Director

APPENDIX C
-2nd REVISED NOTICE OF DECISION-
AR 155; Clerks Papers 962-65



COMMUNITY DEVELOPMENT DEPARTMENT

2nd REVISED NOTICE OF DECISION DENIAL OF SHORELINE SUBSTANTIAL DEVELOPMENT PERMIT EXEMPTION

Date: January 11, 2006
Applicant: Rainier Yacht Harbor, LLC
Bruce Steel, Managing Member
Norpoint Communities
2323 North 31st Street, Suite 200
P.O. Box 875
Tacoma, WA 98401
Re: *Shoreline Exemption Requests (EXP 05-837 and EXP 05-836)*

I. Findings of Fact.

A. The applicant has submitted the following facts in support of a request for a shoreline substantial development permit exemption for the single family residences located at 3525 and 3555 Harborview Drive:

1. The residence located at 3525 Harborview Drive will be constructed for the use of Mike Burton and his family, for use as a single family residence and garage appurtenant to a single family residence, as allowed under WAC 173-27-040(g). This residence is 4,258 square feet in size, with a basement garage of 3,650 square feet.
2. The residence located at 3555 Harborview Drive will be constructed for the use of Bruce Steel and his family, for use as a single family residence and garage appurtenant to a single family residence, as allowed under WAC 173-27-040(g). This residence is 4,917 square feet in size, with a basement garage of 5,150 square feet.
3. The two residences do not exceed a height of 35 feet above average grade level.
4. There is a proposed driveway that will provide access to the garages of both single-family residences and a commercial fishing dock that is partially on the lot at 3525 Harborview Drive. The proposed driveway will access Harborview Drive along the west boundary of 3555 Harborview Drive, run down the west boundary line and the bulkhead. The driveway extends almost the entire north side of the property with the exception of about 50 feet. The driveway will be concrete and 20 feet wide.

The file shows that the driveway provides access to the Burton and Steel residences through a Joint Use and Maintenance Covenant (Recording No. 2005070080293 5 PGS, recorded on 7-8-05), and lists the "common amenities" to the properties as "driveway and road access easement," among other things. The owner of the Burton and Steel properties (Rainier Yacht Harbor, L.L.C., purchased the properties subject to a "Declaration of Easement and the Terms and Conditions thereof, dated May 20, 2005 . . ." The Declaration of Easement (Recording No. 200505240604 8 PGS, dated 05-24-05) provides that Rainier Yacht will provide an easement for ingress and egress to the Jerkovichs (the sellers) from Harborview Drive to the existing dock. This easement was required to be 10 feet in width and "to have turning radiuses (sic) sufficient to allow vehicular and trailer ingress and egress from Harborview Drive to the dock, and is intended to include, without limitation, commercial uses relating to the fishing and maritime industries."

B. On November 2, 2005, the City received a letter from Kim Van Zwalenburg of the Department of Ecology, which provides DOE's interpretation of RCW 90.58.030(3)(e)(vi) and WAC 173-27-040(2)(g) that the garages associated with the two single family residences are not normal appurtenances to a single family residence, and as a result, the exemption should be denied.

C. On November 2, 2005, the City of Gig Harbor issued a Notice of Decision of Denial of Shoreline Substantial Development Permit Exemption. In this Decision, the City based the Denial on the grading, and referenced the portion of the letter from Ms. Zwalenburg, which related to Section B above.

D. On November 7, 2005, the Notice of Decision was revised to correct a typographical error in the Findings of Fact. The Decision was unchanged.

E. On January 5, 2006, Kim Van Zwalenburg sent an e-mail to Bill Lynn, attorney for the applicants. In that e-mail, Ms. Zwalenburg recollected a conversation that she had with Mr. Lynn, discussing the fact that the garages are proposed to be constructed in a manner that will accommodate large numbers of vehicles. Ms. Zwalenburg states that Mr. Lynn informed her that the garages will "likely be used by the owner for a variety of purposes."

F. On January 10, 2006, in response to questioning from the City staff, at least four Community Development Directors/Planning Directors from nearby cities stated that they had never seen any garages of this size associated with single family residences that could compare with the proposed Steel and Burton Residences.

II. Conclusions.

Threshold Decision: Permit is exempt from SEPA per WAC 197-11-800(1)(b)(i).

The garages associated with the single-family residences are extraordinarily large, and will accommodate parking of many vehicles. It has been estimated that the garages

will accommodate somewhere from 14-17 vehicles. In the recollection of the past Gig Harbor Planning Director, Planning Manager and the existing Community Development Director, the garages associated with these applications are larger than any other garages proposed for any other single-family residence in the City of Gig Harbor.

The applicant proposes to construct a driveway that will not only provide access to these garages, but also provide access to a third party. This third party will be utilizing the driveway for vehicular and trailer ingress and egress, in order to access the dock. A recorded easement memorializes the fact that the use of the driveway by this third party "is intended to include, without limitation, commercial uses relating to the fishing and maritime industries."

RCW 59.58.030(3)(e)(vi) and WAC 173-27-040(2)(g) create an exemption for construction of single family residences on shorelands. The construction must be by an owner, lessee or contract purchaser for their own use or the use of their family. A "single family residence" is a detached dwelling designed for and occupied by one family, including those structures and developments with a contiguous ownership which are a normal appurtenance. An appurtenance must be connected to the use and enjoyment of a single-family residence. "Normal appurtenances" include a garage and driveway.

A garage that would accommodate 14-17 vehicles (or even more than 4) is not a normal appurtenance to a single-family residence. The driveway will provide access to the garages in both residences, and also be used for commercial purposes by a third party. Use of the driveway for commercial purposes is not connected to the use and enjoyment of a single-family residence.

III. Decision. The exemption from the requirement to obtain a shoreline substantial development permit is denied. The applicant must obtain a shoreline substantial development permit. The conclusions in this Decision shall supercede the conclusions set forth in the Notice of Decision issued on November 2, 2005, as revised on November 7, 2005.

IV. Appeals.

This decision may be administratively appealed to the Gig Harbor Hearing Examiner pursuant to the procedures in Section 4.10 of the City's Shoreline Master Program, within ten days following the issuance of this Notice of Decision.

V. Distribution.

This Notice of Decision shall be provided to the following persons:

Rainier Yacht Harbor, LLC
Bruce Steel, Managing Member
P.O. Box 875
Tacoma, WA 98401

Richard B. Allen and
Robert Frisbie
3603 Ross Avenue
Gig Harbor, WA 98332

Lita Dawn Stanton
111 Raft Island
Gig Harbor, WA 98335

Chuck Hunter
8829 Franklin Avenue
Gig Harbor, WA 98332

Toni Kent Smith
3414 Harborview Drive
Gig Harbor, WA 98332

Peter Katich
3509 Ross Avenue
Gig Harbor, WA 98332

Kim Van Zwahlenburg
Shoreline Specialist
Department of Ecology
S.W. Regional Office
P.O. Box 47775
Olympia, WA 98504-7775

Pierce County Assessor
2401 South 35th Street Room 142
Tacoma, WA 98409

VI. Compliance with law. RCW 36.70B.130 requires that every Notice of Decision state that affected property owners may request a change in valuation for property tax purposes notwithstanding any program of revaluation.

1/11/06
Date

John P. Vodopich
John P. Vodopich, AICP
Gig Harbor Community
Development Director

APPENDIX D
-COMMUNITY DEVELOPMENT
DEPARTMENT STAFF REPORT-
AR 64; Clerks Papers 612-19



COMMUNITY DEVELOPMENT DEPARTMENT

**COMMUNITY DEVELOPMENT DEPARTMENT
STAFF REPORT**

TO: Hearing Examiner
FROM: Planning Staff
DATE: January 11, 2006

RE: APPEAL 05-1143 and 05-1144 – Appeal of two Notices of Administrative Decisions approving Design Review applications (DRB 05-832 and 05-834) for two proposed single-family homes at 3525 and 3555 Harborview Drive.
Public Hearing Date: January 18, 2006

I. GENERAL INFORMATION

- A. Appellants:** Richard B. Allen
Bob Frisbie
3603 Ross Avenue
Gig Harbor, WA 98332
- B. Property Owner:** Rainier Yacht Harbor, LLC
Managing Members: Bruce Steel and Mike Burton
P.O. Box 875
Tacoma, WA 98401

II. APPELLANT'S REQUEST

The appellants have appealed the two Notices of Administrative Decisions, issued November 28, 2005 by the City approving Design Review applications DRB 05-832 and 05-834 for two proposed single-family homes at 3555 and 3525 Harborview Drive, respectively. The appellants have provided two statements of appeals, identical except for the address and application numbers. The appellant has appealed on two issues: 1. The Design Review approval is inconsistent with the Hearing Examiner's decision (APP 05-817) on the allowance of underground structures within the side yard, and; 2. The single-family homes exceed the 3,500 square foot building floor area maximum for commercial development.

III. SITE DESCRIPTION

- A. **Location:** 3525 and 3555 Harborview Drive
Assessor's Parcels # 5970000250 and 5970000241
- B. **Site Area/Acreage:** 3525 Harborview: 15,638 square feet
3555 Harborview: 38,436 square feet
- C. **Existing Site Characteristics:**
1. **Topography:** The properties sit below Harborview and adjoining parcels; retaining walls bound the properties along Harborview and to the east. The property slopes gently to the bay; a bulkhead runs along the shoreline.
 2. **Vegetation:** Limited vegetation exists on the properties as almost all previous structures were recently demolished.
 3. **Wetlands and Critical Areas:** The property is along the shoreline of Gig Harbor Bay; as such development on the property is subject to the Shoreline Master Program
- D. **Zoning:**
1. **Subject parcel:** WM – Waterfront Millville
 2. **Adjacent zoning and current use:**
 - a. **North:** Gig Harbor Bay
 - b. **South:** R-1 – Single-family homes
 - c. **East:** WM – Single-family home and marina
 - d. **West:** WM – Commercial fishing activities
- E. **Road Access / Utilities:** The two parcels are accessed off of Harborview Drive. The city provides water and sewer.

IV. APPLICABLE CODES AND POLICIES

A. **Gig Harbor Zoning Code:**

Chapter 17.98 GHMC outlines the process for Design Review. GHMC Section 17.98.030 states that "Chapter 17.99 GHMC, Design Manual, applies to all proposals to subdivide land under the provisions of GHMC Title 16 and to all proposals to build, locate, construct, remodel, alter or modify any facade on any structure or building or other visible element of the facade of the structure or building or site, including, but not limited to: landscaping, parking lot layout, signs, outdoor furniture in public or commercial locations, outdoor lighting fixtures, fences, walls and roofing materials (hereafter referred to as outdoor proposals), as described in

Chapter 17.99 GHMC, Design Manual. Design review approval is required for all outdoor proposals which require a building permit, clearing and grading permit, or which are part of a project or development requiring a site plan, conditional use permit or utility extension agreement."

GHMC Section 17.98.050(B)(4) states that "The application shall be reviewed by the director for compliance with the specific requirements of Chapter 17.99 GHMC and all other applicable codes. The director shall issue a decision approving the application or portions thereof if he/she finds that the application or portions of the application satisfy the strict requirements of Chapter 17.99 GHMC, Design Standards. The director shall not approve any application or portion thereof that does not comply with applicable codes."

The development standards for the Waterfront Millville district can be found at GHMC 17.48.040

V. BACKGROUND INFORMATION

This is the background information pertinent to the Design Review applications appealed. Additional background information regarding the City's history with these properties is included in the last section of the staff analysis section.

On June 20, 2005, the City of Gig Harbor issued an Administrative Decision allowing underground off-street parking located in the required side yards on the owners' property. This decision was appealed and after a hearing, the decision was upheld (See Administrative Interpretation Decision, signed June 20, 2005 and Findings, Conclusions and Decisions for APPEAL 05-817, signed August 23, 2005).

The property owners submitted design review applications for 2 single-family residences on July 11, 2005 (see Design Review Application forms for DRB 05-832 and DRB 05-834). The homes are at 3525 and 3555 Harborview Drive, to be known as the Burton and Steel residence respectively. The Burton residence is proposed at 8,022 total square feet – 4,372 square feet for a two story home and 3,650 square feet for a basement. The Steel residence is proposed at 9,642 total square feet – 4,500 square feet for a two story home and 5,150 square feet for a basement. The basements of both homes will also be used to provide the two required parking stalls per single-family residence. (Further details on the proposed homes can be found in the City's files and the enclosed copies of the approved design review plan sets, stamped DRB approved

on 11/28/05.) The design review applications were deemed complete on July 25, 2005.

The staff reviewed the proposed homes for compliance with Design Manual requirements applicable to single-family residences. After several revisions by the applicant, the proposed homes were compliant with the strict requirements of Chapter 17.99. Staff issued an Administrative Decision for each application on November 28, 2005. The appeal period for an administrative decision is 20 days, per GHMC 17.66.050. On December 5, 2005, the appeal was received by the appellants.

In addition, on November 14, 2005, the City of Gig Harbor issued an Administrative Decision allowing underground off-street parking located in the required front yards on the owners' property. This decision was not appealed and became final on December 4, 2005.

VI. PUBLIC NOTICE & INPUT

The legal notice of the appeals and scheduled hearing was published in the Peninsula Gateway on January 4, 2006. In addition, notice was mailed to all property owners within 300 feet of the subject site on January 5, 2006. Notice was also posted on the subject site on January 6, 2006.

VII. STATEMENTS FOR APPEAL

Mr. Allen and Mr. Frisbie provided two statements of appeal on December 5, 2005; they were identical except for application numbers:

"The appeal is submitted based upon the following alleged errors:

1. Refer to Appeal No. 05-817 decision from Michael R. Kenyon dated 23rd day of August, 2005.
 - Refer to lines 19 through 25 on page 4 and line 1 on page 5. The paragraph reads, "As Appellants would have it, since a structure by definition includes underground matter, an underground parking garage would impermissibly occupy the required setback in a required yard. To read various code provisions in that manner, however, ignores the intentional use by the City Council of the term "open space" within the definition of "yard." The purpose of required setbacks is nothing more than the creation of yard space. In no manner will an underground structure interfere with the use of open space in yards.
 - The parking structure extends into the open space and therefore invalidates the approval of the subject structure. The City's approval ignores the Hearing Examiner's decision where he states ... "In no manner will an underground structure interfere with the use of open space required in yards". Refer to the attached area of

the infraction into the open space and the complete building permit file as submitted by the applicant.

2. The building square footage doesn't comply with the size limitation of 3,500 SF including garage for commercial development."

On January 9, 2006, Bob Frisbie provided a copy of a brief and supporting exhibits regarding the appeals. According the information provided by Mr. Frisbie, you were provided a copy of both.

VIII. STAFF ANALYSIS

A. Planning Staff

In regards to the first issue of underground parking, staff believes it is relevant to the Design Manual and thus to the administrative decision. The staff is assuming that the appellants are arguing that staff should not have deemed the setbacks of the basement portion of the homes compliant, since it is asserted by the appellants that the basement/garage is above ground and not underground as allowed by the June 20, 2005 interpretation which was upheld.

GHMC Section 17.48.040(D) states the setbacks of GHMC 17.99.310 and 17.99.320 are applicable in the WM district. GHMC Section 17.99.320 is applicable to residential development in the Waterfront Millville district. The required combined side setback, per 17.99.320(A), for the Burton residence is 24.25 feet; for the Steel residence 25.75 feet.

The garages/basements of both the Burton and Steel homes extend into the combined side setbacks; therefore, to be approvable, staff had to determine that the garages/basements were underground. Neither the Administrative Interpretation (6/20/05) nor Hearing Examiner Decision (APPEAL 05-817) distinguished between existing grade and proposed grade when allowing underground garages. Given this and the fact the City does not prohibit the modification of grade, provided the natural topography of the site is retained (see GHMC 17.99.240(C)), the staff determined that the proposed garages could be in the side setback as long as they were below proposed grade and not be visible. Staff examined the submitted plans and determined that the proposed garage were indeed below the proposed grade. In addition, staff determined that the natural topography of the site was maintained with the proposed grade (per GHMC 17.99.240(C)).

In regards to the Burton residence, the appellant states that a portion of the garage along the west property line will be above the grade existing on the site today. While that may be the case, the garage will not be above the proposed grade. Sheet A1.1 of the Burton residence plans shows a wood terrace, bermed earth and sloped earth covering the garage structure along the west property line. The west exterior elevation – garage section on sheet A4.2 shows the garage will be below the proposed grade and therefore will be underground.

In regards to the Steel residence, the appellant states that a portion of the garage along the west and east property lines will be above the grade existing on the site today. While that may be the case, the garage will not be above the proposed grade. The south exterior elevation – garage section on Sheet A4.1 of the Steel residence plans shows that the garage will be below the driveway on the west side and below earth on the east wide. The east exterior elevation / garage section on sheet A4.2 shows that a patio will also cover portions of the garage in the east side setback.

With the review of these documents, staff determined that both the Burton and Steel garages were underground and therefore deemed the proposed basement/garages compliant with the side setbacks.

In regards to second item: the 3,500 square foot commercial maximum in the statement of appeal. The staff does not believe it is relevant to the Design Manual and therefore the administrative decision appealed. The administrative design decision, as stated within the decision, only relates to the applicable requirements of the Design Manual, Chapter 17.99 GHMC. Chapter 17.99 GHMC does not contain the maximum square foot standard referenced by the appellant. GHMC 17.48.040(I) of the development standards for the Waterfront Millville district states that the maximum gross floor area including garages, attached and detached for a nonresidential building is 3,500 square feet per lot. This section code is reviewed and compliance determined prior to the issuance of a building permit; building permits for these two homes have not been issued. Therefore, staff believes that this issue should not be the subject of this appeal.

That being said, I think it would be helpful to provide some additional background information on the property, project and City ordinances that have affected the projects form. It may help in understanding this complex project and the appellants brief and exhibits.

The appellant has stated that the proposed homes are commercial structures. Nothing in the building permits, design review applications or requests for shoreline substantial development permit exemptions provided by Rainier Yacht Harbor, LLC indicate that the buildings are nothing but single-family residences. While single-family homes are large and the garage can accommodate a variety of vehicles, they are still being proposed as single-family homes (see application materials and the letter dated July 22, 2005 from Bruce R. Steel). Rainier Yacht Harbor, LLC at one time proposed a mixed-use development for the subject properties. On May 12, 2005, a pre-application conference was held with Community Development staff to review a potential mixed-use and marina development on the subject properties. Staff provided written comments and a voice recording of the event. No zoning or building applications were filed with the city for this development at that time. On May 31, 2005, the City Council passed Ordinance 1003 placing a moratorium on the acceptance of applications for new development and redevelopment of nonresidential structures in the Waterfront Millville district. This moratorium effectively stopped Rainier Yacht Harbor, LLC from submitting permits for the mixed-use development.

However, during the moratorium, Rainier Yacht Harbor, LLC instead submitted permits for the subject single-family residences. At the time the building permits were considered vested – July 25, 2005, there was no residential building floor area maximum in the Waterfront Millville district. On August 8, 2005 the Council lifted the moratorium passed by Ord. 1003 (Ord. 1010). On July 25, 2005, the City Council passed Ordinance 1008; however, the ordinance did not become effective until August 8, 2005. This Ordinance 1008 limited the maximum gross floor area, including attached and detached garages, for all structures in the Waterfront Millville district to 3,500 square feet per lot. As the proposed single-family residences were vested prior to August 8, 2005, this change in code does not apply to the building permits.

XI. RECOMMENDATION:

The staff recommends that the Administrative Decisions for applications DRB 05-932 and DRB 05-834 be upheld.

Senior Planner: Jennifer Sitts

Date: 1/11/06

cc: Bruce Steel, managing member Rainier Yacht Harbor, LLC
Bob Frisbie and Richard Allen, appellants
Bill Lind, attorney for Rainier Yacht Harbor, LLC

The following documents pertinent to your review are enclosed:

- Notice of Administrative Decision DRB 05-832, for 3555 Harborview Drive, dated 11/28/05
- Notice of Administrative Decision DRB 05-834, for 3525 Harborview Drive, dated 11/28/05
- Appeal of Notice of Administrative Decision for DRB 05-832, by Richard B. Allen and Bob Frisbie, received 12/5/05
- Appeal of Notice of Administrative Decision for DRB 05-834, by Richard B. Allen and Bob Frisbie, received 12/5/05
- Steel Residence drawings set, stamped Design Review Approval DRB 05-832, dated 11/28/05, 23 sheets
- Burton Residence drawings set, stamped Design Review Approval DRB 05-834, dated 11/28/05, 22 sheets
- Administrative Interpretation Decision, dated 6/20/05, for Rainier Yacht Harbor, LLC
- Appeal No. 05-817 Findings, Conclusions and Decision, dated 8/23/05
- DRB 05-832 Design Review Application, Single-Family Residence, received 7/11/05
- DRB 05-834 Design Review Application, Single-Family Residence, received 7/11/05
- Statement of Complete Application, DRB 05-832, dated 7/25/05
- Statement of Complete Application, DRB 05-834, dated 7/25/05
- Administrative Interpretation Decision, dated 11/14/05, for Rainier Yacht Harbor, LLC
- Letter dated 7/22/05 from Bruce R. Steel to Ms. Kristin Riebli, Associate Planner, received 7/25/05
- Ordinance No. 1003, passed by Council on 5/31/05
- Ordinance No. 1008, passed by Council on 7/25/05
- Ordinance No. 1010, passed by Council on 8/8/05
- Remainder of City's file for DRB 05-832 and EXP 05-836
- Remainder of City's file for DRB 05-834 and EXP 05-837
- Remainder of City's file for APPEAL 05-1143 and APPEAL 05-1144

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